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No. 02-42

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada**

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
FTB Privacy Notice – September 6, 1991	5
FTB Strategic Plan – January, 1992	9
Larry Moy's Penalties Memorandum, August 31, 1993	16
Demands to Furnish Information:	
January 24, 1995 – The Sports Authority	19
January 24, 1995 – Nevada Development Authority	20
January 24, 1995 – Nevada Development Authority	21
January 26, 1995 – Personal Computer Users Group	23
January 26, 1995 – Temple Beth Am	24
February 17, 1995 – Temple Beth AM	26
March 10, 1995 – Ms. Sherri Lewis & Ms. Clara Kopp	27
March 23, 1995 – Congregation Ner Tamid	29
March 24, 1995 – Las Vegas Valley Water District	30
March 24, 1995 – Silver State Disposal Service	32
March 24, 1995 – Southwest Gas Corp.	33
March 24, 1995 – Las Vegas Sun	34
March 28, 1995 – Clark County Department of Election	36
April 12, 1995 – Nevada Governor Robert Miller	37
April 12, 1995 – Nevada Senator Richard Bryan	38

TABLE OF CONTENTS – Continued

	Page
August 4, 1995 – Las Vegas Sun	39
August 4, 1995 – Times Orange County	40
August 4, 1995 – Orange County Register	42
Photograph – Date unknown but after close of 1991 audit	44
Complaint, Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, filed January 6, 1998	45
Gilbert P. Hyatt v. Franchise Tax Board, United States District Court, District of Nevada Case No. CV-S-98-0248-HDM (LRL) Order Concerning Removal, filed February 19, 1998	71
Gilbert P. Hyatt v. Franchise Tax Board, United States District Court, District of Nevada Case No. CV S-98-0248 HDM(LRL), Remand To Nevada District Court, filed May 1, 1998	74
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Answer To First Amended Complaint, filed August 13, 1998	76
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript Of Proceeding Before The Discovery Commissioner Thomas W. Biggar, February 22, 1999	87
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Order Granting Partial Judgment On The Pleadings, issued April 16, 1999	93

TABLE OF CONTENTS – Continued

	Page
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript of Deposition of Carole Ford, May 4, 1999, pp. 151-54	98
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript of Interview with Darlene Beer, August 26, 1999	102
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript Of Proceeding Before The Discovery Commissioner Thomas W. Biggar, November 9, 1999	117
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, District Court's Order Granting Discovery Commissioner's Report and Recommendation, November 9, 1999 re Evidentiary Privileges, filed December 27, 1999	135
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript of Deposition of Candace Les, January 11, 2000, pp. 10-11, 22-25, 42, 51-52, 59-63, 69-70, 101, 113-14, 168, 171-72, 176, 181-82, 226-28, 245-46, 253-55, 263-64, 268-69, 275, 329-30, 347, 389, 405, 615, 677-78, 684-85, 687	147
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Sheila Cox Affidavit, January 21, 2000	181
Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Cowan Affidavit and Exhibits, March 20, 2000	192

TABLE OF CONTENTS – Continued

Page

Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Reporter's Transcript of Proceedings Before The Honorable Judge Saitta, April 21, 200, pp. 41-43.. 227

Gilbert P. Hyatt v. Franchise Tax Board, Clark County District Court Case No. A382999, Order Denying Franchise Tax Board's Motion For Summary Judgment, filed May 31, 2000..... 231

Nevada Supreme Court Case No. 36390, Transcript of Proceedings, February 9, 2001, pp. 12-13, 17-27 236

Real Party In Interest Gilbert P. Hyatt's Petition For Rehearing Re the Court's June 13, 2001 Order Granting Petition For Writ Of Mandamus Case No. 36390, Filed July 5, 2001 246

Real Party In Interest Gilbert P. Hyatt's 15 Page Supplement to his Petition For Rehearing Re The Court's June 13, 2001 Order Granting Petition For Writ Of Mandamus, Case No. 36390..... 267

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for Certiorari:

District Court Clark County, Nevada Case No. A382999, First Amended Complaint, dated June 12, 1998 .....App. 49

District Court Clark County, Nevada, Discovery Commissioner's Report and Recommendation, filed December 27, 1999.....App. 22

In the Supreme Court of the State of Nevada, Docket Number 36390, Writ of Mandamus, dated June 13, 2001 .....App. 36

TABLE OF CONTENTS – Continued

Page

In the Supreme Court of the State of Nevada, Docket Numbers 35549 and 36390. Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549), filed June 13, 2001 ...App. 38

In the Supreme Court of the State of Nevada, Docket Number 36390, Writ of Mandamus, dated April 4, 2002 .....App. 1

In the Supreme Court of the State of Nevada, Docket Number 35549, Writ of Prohibition, dated April 4, 2002.....App. 3

In the Supreme Court of the State of Nevada, Docket Numbers 35549 and 36390, Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition For A Writ Of Mandamus In Part In Docket No. 36390, and Granting Petition For A Writ of Prohibition In Part In Docket No. 35549, dated April 4, 2002.....App. 5

In the Supreme Court of the State of Nevada, Docket Numbers 39274 and 39312, Order Denying Petition For Writ Of Mandamus Or Prohibition And Dismissing Appeal, dated April 4, 2002.....App. 20

RELEVANT DOCKET ENTRIES

1. Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on January 6, 1998;

2. Notice of Filing Removal Petition to the United States District Court, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on February 17, 1998;

3. Minutes of the Court Ordering Remand to Nevada District Court, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in United States District Court, District of Nevada, Case No. CV-S-98-0284 HDM (LRL), dated May 1, 1998;

4. First Amended Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on June 12, 1998;

5. Answer of Defendant Franchise Tax Board of the State of California to the First Amended Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on August 13, 1998;

6. District Court Order Sealing Courtroom Proceedings, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the State of

Nevada, Clark County, Case No. A 382 999, on February 22, 1999;

7. Order Granting Partial Judgment On The Pleadings for Defendant Franchise Tax Board of the State of California, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on April 19, 1999;

8. District Court Order Adopting Discovery Commissioner's Report and Recommendation, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on December 27, 1999;

9. Petition For Writ of Mandamus or Prohibition of Petitioner Franchise Tax Board in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt), Nevada Supreme Court Docket No. 35549, filed on January 27, 2000;

10. Order Denying Motion For Summary Judgment of the Defendant Franchise Tax Board of the State of California, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, filed on May 31, 2000;

11. Order Directing Answer, Temporarily Staying District Court Proceedings and Directing Clarification of Documents, in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt), Nevada Supreme Court Docket No. 35549, filed on June 7, 2000;

12. Petition For Writ of Mandamus Ordering Dismissal, or Alternatively for a Writ of Prohibition and Mandamus Limiting the Scope of the Case of Petitioner Franchise Tax Board in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt), Nevada Supreme Court Docket No. 36390, filed on July 7, 2000;

13. Orders Consolidating Petitions in Docket Nos. 35549 and 36390, Directing Answer in Docket No. 36390 and Clarifying Order Granting Temporary Stay in Docket No. 35549 in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt), Nevada Supreme Court, filed on September 13, 2000;

14. Oral Argument on Docket Nos. 35549 and 36390, in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court on February 9, 2001;

15. Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549), in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court on June 13, 2001;

16. Petition for Rehearing, in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court Docket No. 36390, filed on July 5, 2001;

17. Order Denying Motion to Vacate Protective Order, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the

State of Nevada, Clark County, Case No. A 382 999, filed on January 31, 2002;

18. Franchise Tax Board's Petition for Writ of Mandamus or in the Alternative, for Writ of Prohibition re Protective Order, Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court Docket No. 39274, filed on March 4, 2002;

19. Franchise Tax Board's Appeal Order re Protective Order, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, Nevada Supreme Court Docket No. 39312, filed on March 4, 2002;

20. Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549. Order Denying Writ of Mandamus or Prohibition in Docket No. 39274, and Order Dismissing Appeal in Docket No. 39312, Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court, filed April 4, 2002.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD

Your tax return has been selected for audit by the California Franchise Tax Board (FTB).

What should you expect from a Franchise Tax Board audit?

- Courteous treatment by FTB employees
- Clear and concise requests for information from the auditor assigned to your case
- Confidential treatment of any personal and financial information that you provide to us
- Completion of the audit within a reasonable amount of time

At the close of the audit, you will be told in writing that:

- We are accepting the return as you filed it, or
- You have additional tax due, or
- You have overpaid your tax and are entitled to a refund, or
- We have not changed your tax amount, but you may be entitled to a refund if you correctly recompute your tax and file a claim for a refund before the Statute of Limitation expires

Please see reverse side for additional information.

PRIVACY NOTICE

The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you

why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California. We may request additional information if we audit your return or take collection action.

If you meet the income requirements, the Revenue and Taxation Code requires you to file a return or statement in the form we prescribe (Sections 18401 and 18431). When you file these or other documents, you must include your social security number for identification and return processing (Section 18934).

It is mandatory to furnish all information requested when you are required to file a return or statement. If you do not file a return, or do not provide the information we ask for, or provide fraudulent information, the law says you may be charged penalties and interest and, in certain cases, you may be subject to criminal prosecution. We also may disallow claimed exemptions, exclusions, credits, deductions or adjustments. This could make the tax higher or delay or reduce any refund.

We may give the information you furnish us to the United States Internal Revenue Service, the proper official of any state imposing an income tax or a tax measured by income, the Multistate Tax Commission and to California government agencies and officials, as provided by law. If you owe any monies, we may disclose the amount due to employers, financial institutions, County Recorders, vacation trust funds, process agents and other payers.

You have a right to access records containing your personal information maintained by the Franchise Tax Board. The officials responsible for maintaining the information are: 1) Filing of returns – Director; Document Processing

Bureau; 2) Auditing of returns – Director, Personal Income Tax Audit Bureau; and 3) Collection of monies – Director, Enforcement Bureau. The address is: Franchise Tax Board, P.O. Box 942840, Sacramento, CA 94240-1040; telephone: (800) 852-5711.

What else should you know about your audit?

- You may represent yourself or have someone else represent you (with your proper authorization).
- It is to your benefit to respond to our requests for information both promptly and completely. Your failure to do so may result in the FTB adjusting your tax return and assessing penalties for not furnishing the information we requested.

If we propose any changes to your return, it is important that you understand the reason for the change. If you have any questions, contact the auditor assigned to your case. The telephone number is in the letter that we sent with this notice.

PLAINTIFF'S
EXHIBIT

FTB 05905
(18 pages)

STRATEGIC PLAN

A STATEMENT OF MAJOR ISSUES CONFRONTING THE FRANCHISE TAX BOARD AND THE STRATEGIES FOR ADDRESSING THEM

FRANCHISE TAX BOARD
STATE OF CALIFORNIA

January 1992

Message From The Executive Officer

The importance of planning at the Franchise Tax Board has never been greater than it is now. The issues which affect us are critical not only to our organization, but to the entire state. With severe fiscal problems, a highly diverse and rapidly growing population, unmet social needs and an uncertain economic future, our elected officials have turned to those of us who are responsible for administering the state's tax programs. We are expected to do all we can to ensure that tax dollars are promptly, effectively and efficiently collected to keep vital state programs and services running. Clearly this is not a new assignment, but it has now taken on an unprecedented level of urgency and attention.

To meet these expectations, we must have a well-thought-out-plan of action which not only responds to immediate problems in administering our programs, but anticipates future needs as well. I am pleased to present you with this new Strategic Plan which describes the major actions we must take in order to continue to successfully accomplish our vital mission.

In many ways, our preparation for today has been underway for a long time. Eleven years ago, we adopted a strategic planning process in anticipation of the kinds of important events and responsibilities now facing us. Three years ago, we included all employees in the distribution of the plan so all of us would know more about our most critical issue and our major strategies for addressing them. We also asked everyone to think about our mission, our shared organizational values and how each of us can contribute to getting the job done better.

This year, we conducted a review of our progress over the past two years in a series of "report cards," or status reports, which have been distributed to all employees in the form of a **"Supplement to the July 1989 Strategic Plan."** The reports took a new look at our strategic issues based on the experience we have gained. I believe all our planning experience has better prepared us to know what we must do, how we will do it and the role each of us must play.

I am confident that the outstanding talent and team spirit we have at FTB will enable us to fulfill the expectations and responsibilities assigned to us. There are many challenges before us. As is the case in any good team effort, everyone is an important player and everyone's contribution will count.

/s/ Gerald H. Goldberg
Gerald H. Goldberg
Executive Officer

January, 1992

Work Force - Issue Paper

[LOGO]

Issue

FTB must continue to be a highly effective and efficient revenue producing agency. In order to fulfill this responsibility, we need to continue and expand upon the efforts we have made to improve our recruitment, development, use and retention of a qualified work force.

Background

California has long been viewed as a desirable place to live and work. People with options in the labor market have chosen employment in our state for a variety of attractive reasons: good climate, excellent schools, affordable housing, a strong local economy and so forth. However, several recent developments have led some observers to conclude that California's "day in the sun" may be fading. In fact, one of the more disturbing reports claims that California is now among the least desirable places to live and work by those with employment options.

The evaluations of California's condition may or may not be accurate, but it is clear that our state is facing many challenges. Rapidly changing demographics, a sagging economy, and an unprecedented budget deficit are placing severe strains on the state's infrastructure and support services. Illegal-drugs, crime and domestic violence plague our communities. Our education systems face serious problems with extremely high student drop-out rates, low test scores, and classroom overcrowding. At the college level, fees have risen to rival costs in other states. At the same time, course offerings are being reduced and faculty laid off. Housing costs have also spiralled upward.

The four largest metropolitan areas in California are now among the most expensive markets in the nation based on median home prices. In the labor market, available skill levels have not kept pace with the needs of employers. In response, some organizations have introduced training programs to enhance the skill levels of their existing workers.

Recognizing the many challenges facing all California employers, FTB undertook a major effort beginning in 1989 "to remain competitive in the labor market and produce the quality products and services our customers need and expect." This effort included a department-wide review, revision and sharing of our mission and values. It also included changes to policies and procedures, the general work environment and the ways in which we communicate with each other and our customers.

In addition to internal changes, we became more actively involved in the communities around our largest offices. Involvement with local schools was initiated to improve the skills of our future workers. As the largest employer in Rancho Cordova, we became active participants in the Chamber of Commerce and the Transportation Management Association. Our continued involvement in these organizations supports their efforts to make the area a more attractive place to work and live. If successful, these efforts will assist us to recruit and maintain a qualified work force.

All of these changes were undertaken in recognition of the fact that our State, our work force and the way we do our work has changed and will continue to do so in the future. Events in California since 1989 have clearly supported the need and urgency for our actions. In the short term, the economic downturn means that many highly qualified people are looking for work. In the longer term, however, continued fiscal problems at

the state and local levels may mean that employment in the public sector will not be as attractive as it once was to many skilled job seekers.

Discussion

The current budget crisis in California has a mixed impact on FTB. Our primary mission as a tax revenue producer protects us from the more severe budget reductions required in other areas of state government. However, the demands for performance and efficiencies in revenue production are higher than they have ever been. The new systems being introduced to make us more efficient and effective will also require that we continue to retain and recruit the skilled workers needed to perform our increasingly complex jobs. At the same time, the competition for skilled workers will increase. Nationwide, for example, more new jobs are projected for business school and computer science graduates than there are students currently enrolled in those majors.

Our first responsibility as an organization continues to be getting our basic jobs done. We must collect the revenues needed to support state government in the most effective and efficient manner possible. We can only fulfill this responsibility if we are able to recruit and retain a qualified work force. Today, this clearly demands our being responsive to the changing skills, values, mix, and needs of our current and potential employees. In many ways, FTB's future performance will depend on our being viewed as a "good place to work." Our involvement in the community and improvements inside the organization will continue to be part of our overall strategies for fulfilling FTB's responsibilities.

Legislation – Issue Paper

[LOGO]

Issue

The increasing number, complexity and significance of proposed tax legislation require that we develop a greater capacity for the timely and accurate analysis of the proposals and the effective implementation of new laws.

Background

During the past several years, major tax law changes have been enacted at both the federal and state level. At the federal level, emphasis has been placed on reducing the federal deficit by increasing tax revenue without a general tax increase. This has been done through the enactment of new provisions which modify accounting practices, close "loopholes," and accelerate the collection of taxes.

At the state level, emphasis has been on keeping state income tax provisions in conformity with federal law, providing a favorable business climate, and maintaining a balanced budget. While in most recent years the budget has been balanced, in part, by enacting tax changes which close loopholes and accelerate revenue, the most recent budget balancing actions have resulted in actual tax increases.

The events of the past several years have led to the enactment of some of the most comprehensive and complex tax law changes in the state's history. The expertise of departmental staff has been relied on

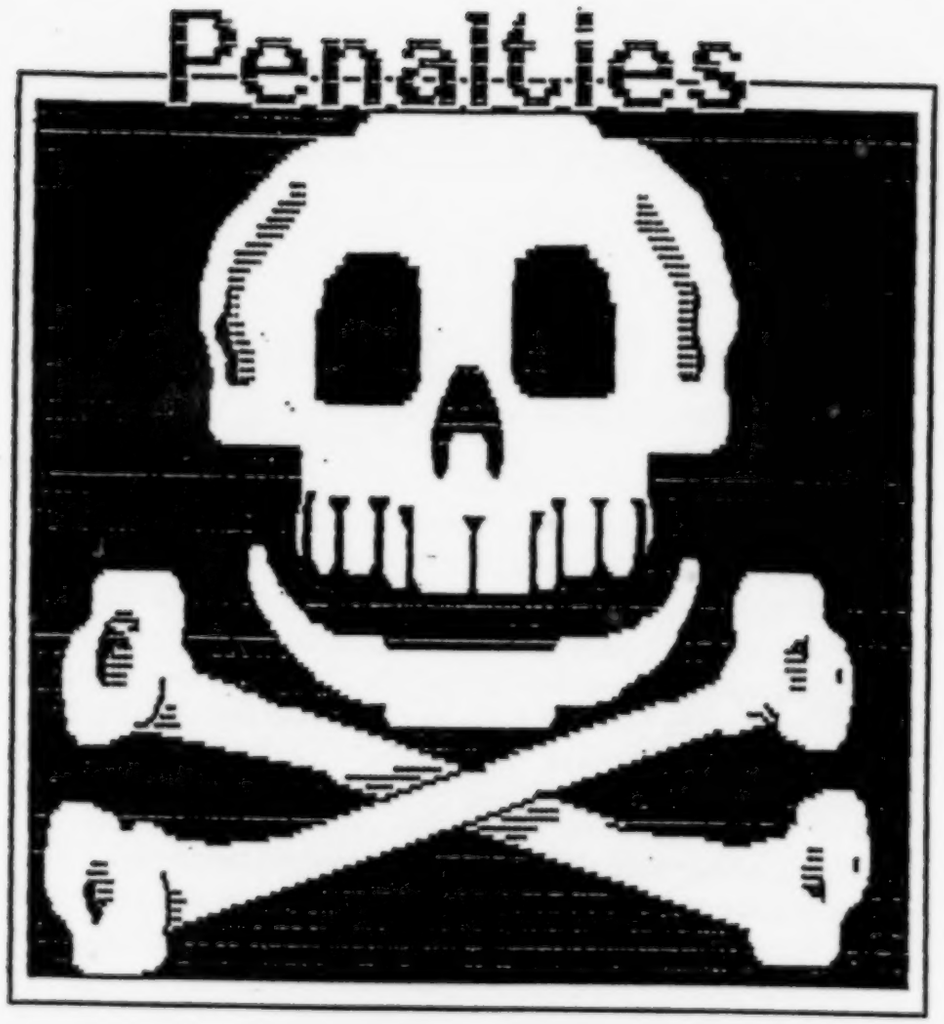
heavily to ensure the development of technically correct language, accurate analysis of the administrative and revenue impact of changes, and effective and efficient administration of the new laws.

Discussion

It is unlikely that the Legislature will be willing to raise taxes again in the near future even if California's economy does not significantly improve. Thus, the emphasis will almost certainly return to loophole closing, revenue acceleration and improving the level of compliance. This will not necessarily simplify the tax code. In fact, the introduction of complex tax law changes will undoubtedly continue. This will place additional pressures on the ability of the department to cope with the changes and provide the level of service our customers (taxpayers, the Legislature, and the Administration) have grown to expect.

Improving our ability to accurately analyze and implement tax law changes requires the continuation of a number of strategies and the development of new action plans. The major thrust of our plans will be on improving our technical knowledge and knowledge of the interaction of tax law on California citizens and business; improving our communications both inside and outside the department; gathering and using tax, financial and economic data effectively; and developing our staff abilities and expertise.

Penalties



Prepared by:

Larry Moy

Los Angeles District Office

August 31, 1993

Introduction

The responsibility for administering California's personal and bank & corporation income tax laws rests with the Franchise Tax Board. To assist the FTB with compliance, penalties were provided for in the state's tax laws.

The purpose of this class is twofold:

1. To make the auditors aware of the most common penalties present in the income tax laws.
2. To describe the situations or circumstances when we would enforce these penalties.

Benefits of Penalties to Auditors:

As stated above, a benefit of having penalties is to have compliance on the part of the taxpayers. As auditors, we know the value of having taxpayers or their representatives cooperate with our requests and demands. By properly using the full force of the penalties written into our tax laws we may better be able to get the taxpayers to be more cooperative.

Scope of the Class:

We will limit our discussion to the six penalties which I felt auditors would most likely come across while performing their jobs. The six penalties are:

1. Failure to File Return
2. Failure to Furnish Information
3. Substantial Understatement of Income Tax
4. Negligence or Disregard of Rules or Regulation
5. Fraud
6. Failure to Pay by Due Date

This discussion will focus on the treatment of these six penalties for the years between 1988-1991, inclusive. These years were selected since most auditors are working with returns filed for this time frame. Although we will concentrate on the six penalties mentioned above, a list of other penalties and a brief description of each is enclosed with this package beginning on page 19.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254(a) and 26423(a)*)

The People of the State of California to:

The Sports Authority
2620 Decatur Boulevard
Las Vegas, Nevada 89102

In the Matter of:
Gilbert P. Hyatt

Social Security No. : 069-30-9999
or Corporation No. :
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership.
2. Copy of any address changes submitted and date submitted.

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 89109

In the Matter of: Social Security No.: 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership in NDA.
2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any meetings or functions.

[We cannot find any listings for Digital Nytronics or Gilbert Hyatt 10/91 /s/ Carrie Cooper]

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
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19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue &

(Continued on following page)

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 89109

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

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2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any meetings or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254(a) and 26423(a)*)

The People of the State of California to:

Personal Computer Users Group
316 Bridger Avenue
Las Vegas, Nevada 89101

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Cha. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance at any meetings or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 26, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Temple Beth AM
4180 Pecos Road
Las Vegas, Nevada

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: JaNUARy 26, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Temple Beth Am
9001 Hill Point
Las Vegas, Nevada 89134

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 2/17/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Ms. Sherri lewis & Ms. Clara Kopp
c/o Wagon Trails Apartments
3225 South Pecos Road
Las Vegas, Nevada 89121

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

Please provide copies of the following documents from the file of Gilbert Hyatt:

1. copy of rental application.
2. Copy of applicant's employer, previous address, closest relative, etc.
3. Copy of 30 day notice letter from Mr. Hyatt.
4. Copy of envelope in file postmarked December 8, 1991.
5. Copy of a report from maintenance after Mr. Hyatt vacated the apartment.
6. Copy of forwarding address given by Mr. Hyatt

FRANCHISF TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/10/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Congrgation [sic] Ner Tamid
2761 Emerson Avenue
Las Vegas, Nevada 89121

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Please verify dates of any contributions made since 1991.
2. Copy of application for membership.

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3. Copy of any address changes submitted and date submitted.

4. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 3/23/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Las Vegas Valley Water District
1001 S. Valley View Blvd.
Las Vegas, Nevada 89153

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of water bills (with the name of the person on whose account it was billed) at 7335 Tara, Las Vegas, Nevada for the following period:

   April 1992 to December 1992
   January 1993 to December 1993
   January 1994 to December 1994
   January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Silver State Disposal Service
770 E. Sahara Blvd.
Las Vegas, Nevada 89104

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of trash disposal bills (with the name of the person on whose account it was billed) at 7335 Tara Las Vegas, Nevada, for the following period:

April 1992 to December 1992
January 1993 to December 1993
January 1994 to December 1994
January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Southwest Gas Corp.
P.O. Box 98512
Las Vegas, Nevada 89193-8512

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of gas bills (with the name of the person on whose account it was billed) at 7335 Tara Las Vegas for the following period:

   April 1992 to December 1992
   January 1993 to December 1993
   January 1994 to December 1994
   January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue &

(Continued on following page)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 10/91 to the present. If yes, indicate the address that the subscription was sent to.

2. Was there a subscription to the Las Vegas Sun at 3225 S. Pecos apt. 237 during the period 11/91 – 4/92? If so, indicate the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Taxation Code which caused some sections to be revised and renumbered.

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 200
BURBANK, CA 91502-1170

556-2942

3/28/95

Clark County Department of Election
1860 E. Sahara Ave.
Las Vegas, Nevada 89104

For the purpose of administering the personal income tax law of the state of California and for that purpose only, we would appreciate your cooperation in providing photocopies of the following information about the person indicated below:

Name GILBERT P. HYATT
SSN: 069-30-9999
ADDRESS: 3225 S. Pecos Rd.
Las Vegas, Nevada 89121

1. Please send copies of any address changes submitted by the person listed above, including the dates of the changes.
2. Please list the dates of the elections in which the above individual voted, and whether an absentee ballot was used.

For your own convenience, you may make marginal notations on this letter and send it back in the stamped self-addressed envelope.

Thank you for your valuable cooperation in this matter. If you have any questions, please feel free to call.

Sheila Cox
Tax Auditor

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 200
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Governor Robert Miller
555 E. Washington Avenue
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 2000
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Senator Richard Bryan
300 S. Las Vegas Blvd.
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.

2. Indicate if there were any subscriptions to the Las Vegas Sun at 3225 S. Pecos Apt 237 during 1991-1992 and at 7335 Tara from 1992 to the present. If so, indicate the start and stop dates of service and name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

The People of the State of California to:

Times Orange County
Times Mirror Square
Room 410
Los Angeles, CA 90053

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Times Orange County during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.

2. Was there a subscription to the Times Orange County at 7841 Jennifer Circle in La Palma during 1991 to the present? If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Orange County Register
625 N. Grand Ave.
Santa Ana, CA 92701

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

1. Indicate if the above individual has subscribed to the O.C. Register during the period from 1991 to the present. If yes, indicate the start and stop dates of service and the address that the subscription was sent to.

2. Was there a subscription to the O.C. Register at 7841 Jennifer Circle in La Palma during 1991 to present. If so, indicate the start and stop dates and the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

COMP
Thomas L. Steffen (1300)
Mark A. Hutchison (4639)
HUTCHISON & STEFFEN
530 South Fourth Street
Las Vegas, NV 89101
(702) 385-2500

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff,	) Case No.) Dept. No.) Docket No.
vs.	)
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	) **COMPLAINT**) Jury Trial Demanded) Exempt from Arbitration:) Declaratory Relief, Significant) Public Policy and Amount in Excess Of $40,000) (Filed Jan. 6, 98)

Plaintiff, Gilbert P. Hyatt, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in his complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of

their employer's or principal's business, whether the employer or principal be FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, *inter alia*, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, and Fifth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California; (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency, domicile and place of abode and

causing (a) an unreasonable intrusion upon plaintiff's seclusion, (b) an unreasonable publicity given to private facts, and (c) casting plaintiff in a false light; and (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode. The claims specified in this paragraph constitute five separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

Plaintiff's Residency in Nevada

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiffs' extensive search, commencing in December 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

THE FTB and Defendants' Investigation of Plaintiff in Nevada

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991

Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada, including plantiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information

concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government

agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

Assessment for 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative

procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based upon governmental greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

The FTB's Continuing Pursuit of Plaintiff in Nevada

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notes from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would

seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the

entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of a liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

The FTB's Motive

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September 1, 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

Jurisdiction

26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individual's income subject to California state income tax during such period, the individual must have been either domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014.

The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

(a) Domicile.

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from another state; (8) registering a car in another state; (9) joining religious, business and/or organizations in another state; and (10) establishment of a successful business in another state by an individual who is self-employed.

(b) Temporary or Transitory Purpose.

The following contacts which are similar although not identical to those used to determine docimile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an

individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another state; (8) obtaining a driver's license from another state; (9) registering a car in another state; (10) joining religious, business and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty for 1991 is based upon the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts, include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented and resided at an apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote, obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas, commencing in December of 1991; (6) plaintiff's offer to

purchase a home in Las Vegas was accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time bona fide resident of the State of Nevada effective from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to

be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon The Seclusion of Another)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated

plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purpose for which such damages are awarded.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given to Private Facts)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the

FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff in a False Light)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plantiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as

having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION

(For The Tort of Outrage)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such

extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26,

1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB had no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

DATED this 6th day of January, 1998.

HUTCHISON & STEFFEN

By: /s/ Mark A. Hutchison
Thomas L. Steffen
Mark A. Hutchison
530 South 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GILBERT P. HYATT, Plaintiff, v. CALIFORNIA FRANCHISE TAX BOARD, Defendant.	)	CV-*S-98-00248-HDM(LRL)*

ORDER CONCERNING REMOVAL

(Filed Feb. 19, 1998)

To all parties removing actions to this Court:

You must, no later than fifteen days from the date hereof, file and serve a signed statement under the case and caption that sets forth the following information:

1. The date(s) on which you first received a copy of the summons and complaint in the removed action.

2. The date(s) on which you were served with a copy of the summons and complaint, if any of those dates are different from the date(s) set forth in item number 1.

3. In removals based on diversity jurisdiction, the names of any served defendants who are citizens of Nevada, the citizenship of the other parties and a summary of defendant's evidence of the amount in controversy.

4. If your notice of removal was filed more than thirty (30) days after you first received a copy of the summons and complaint, the reason removal has taken place at this time and the date you first received a paper identifying the basis for removal.

5. In actions removed on the basis of this Court's jurisdiction in which the action in state court was commenced more than one year before the date of removal, the reasons this action should not summarily be remanded to the state court.

6. The name(s) of any defendant(s) known to have been served before you filed the notice of removal who did not formally join in the notice of removal and the reasons they did not.

IT IS FURTHER ORDERED that all defendants who joined in the notice of removal may file the statement required by the foregoing jointly.

IT IS FURTHER ORDERED that counsel shall have thirty days within which to file a Joint Status Report which must:

1. Set forth the status of this action, including a list of any pending motions and/or other matters which require the attention of this Court.

2. Include a statement by counsel of action required to be taken by this Court.

3. Include as attachments copies of any pending motions, responses and replies thereto and/or any other matters requiring the Court's attention not previously attached to the Notice of Removal.

IT IS FURTHER ORDERED that the removing defendant(s) shall serve a copy of this order on all other parties to the action no later than the time they file and serve a copy of the Statement required by this order. Any party who learns at any time that any of the information provided in the Statement(s) filed pursuant to this order

contains information that is not correct shall immediately notify this Court in writing.

IT IS SO ORDERED.

The date of the Clerk's file stamp shall constitute the date of this order.

/s/ Lloyd D. George
LLOYD D. GEORGE
CHIEF U.S. DISTRICT JUDGE

/s/ Howard D. McKibben
HOWARD D. McKIBBEN
U.S. DISTRICT JUDGE

/s/ Philip M. Pro
PHILIP M. PRO
U.S. DISTRICT JUDGE

/s/ David W. Hagen
DAVID W. HAGEN
U.S. DISTRICT JUDGE

/s/ Edward C. Reed, Jr.
EDWARD C. REED, JR.
SENIOR U.S. DISTRICT JUDGE

[Certificate of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GILBERT P. HYATT, Plaintiff(s), vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *et al.*, Defendant(s).	CV-S-98-0284-HDM(LRL) MINUTES OF THE COURT May 1, 1998

PRESENT: HONORABLE HOWARD D. McKIBBEN, CHIEF U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Kathryn M. French

Counsel for Plaintiff(s): Thomas L. Steffen and Mark A. Hutchison

Counsel for Defendant(s): Thomas R. C. Wilson, Matthew C. Addison & Jim C. Guidici

PROCEEDINGS: Telephonic Hearing on Plaintiff's Motion to Remand (#5)

2:00 p.m. Court convenes.

Arguments are made on the motion to remand by Thomas Steffen on behalf of plaintiff and by Thomas Wilson on behalf of defendant.

The court sets forth the findings of fact and conclusions of law on the record.

IT IS ORDERED that Plaintiff's Motion to Remand (#5) is *granted*. Plaintiff's motion for costs is *denied*. This

case is remanded to the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

The remaining motion, Defendant's Motion to Quash Service of Process and for No Other Relief (#12), is reserved for the state court to address.

2:35 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ [Illegible]
Deputy Clerk

ANS
THOMAS R. C. WILSON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. : A382999 Dept. No. : X Docket No. : R ANSWER TO FIRST AMENDED COMPLAINT

COME NOW, Defendant Franchise Tax Board of the State of California ("FTB"), by and through its attorneys, McDonald Carano Wilson McCune Bergin Frankovich & Hicks, LLP, and as an Answer as follows:

ANSWER

1. FTB denies each and every allegation contained in Paragraph 1.

2. FTB admits, in general, the allegations contained in Paragraph 2.

3. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 3.

4. FTB denies each and every allegation contained in Paragraph 4.

5. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 5.

6. FTB believes Plaintiff's statements in Paragraph 6 do not constitute allegations and therefore do not require a response.

7. FTB believes Plaintiff's statements in Paragraph 7 constitute a summary of the cause of action and therefore do not require a response.

8. FTB denies Plaintiff established full-time residency in Nevada on September 28, 1991, and, with regard to the remaining allegations in Paragraph 8, FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each of them.

9. FTB denies each and every allegation contained in Paragraph 9.

10. FTB admits Plaintiff filed a state income tax return with the State of California for 1991, but it denies each and every remaining allegation in Paragraph 10.

11. FTB has audited Plaintiff's tax return(s) and investigated Plaintiff's Nevada contacts, but it denies each

and every remaining allegation contained in Paragraph 11.

12. FTB denies each and every allegation in Paragraph 12.

13. FTB admits issuing requests to certain Nevada entities and people for information concerning Plaintiff without seeking permission from a Nevada court or any Nevada government agency, but it denies each and every remaining allegation in Paragraph 13.

14. FTB admits sending correspondence to certain Nevada government officials seeking information regarding Plaintiff, but it denies each and every remaining allegation contained in Paragraph 14.

15. FTB denies each and every allegation contained in Paragraph 15.

16. FTB admits the allegations contained in Paragraph 16. IRS issued formal notice.

17. FTB denies each and every allegation contained in Paragraph 17.

18. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 18.

19. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 19.

20. FTB denies each and every allegation contained in Paragraph 20.

21. FTB denies, and/or is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 21.

22. FTB denies each and every allegation contained in Paragraph 22.

23. FTB denies each and every allegation contained in Paragraph 23.

24. FTB denies each and every allegation contained in Paragraph 24.

25. FTB denies each and every allegation contained in Paragraph 25.

26. FTB denies each and every allegation contained in Paragraph 26.

27. FTB denies each and every allegation contained in Paragraph 27.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. In response to Paragraph 28, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 27, as thought set forth herein.

29. FTB believes Paragraph 29 constitutes Plaintiff's counsel's view of California law, and not allegations of fact which require a response herein. To the extent, however, the statements in Paragraph 29 constitute allegations, FTB denies each and every one of them.

30. FTB denies each and every allegation contained in Paragraph 30.

31. FTB denies each and every allegation contained in Paragraph 31.

32. FTB denies each and every allegation contained in Paragraph 32.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon the Seclusion of Another)

33. In response to Paragraph 33, FTB realleges and incorporates herein by this reference each and every allegation contained in paragraphs 1 through 32 above, as thought set forth herein.

34. FTB denies each and every allegation contained in Paragraph 34.

35. FTB denies each and every allegation contained in Paragraph 35.

36. FTB denies each and every allegation contained in Paragraph 36.

37. FTB denies each and every allegation contained in paragraph 37.

38. FTB denies each and every allegation contained in Paragraph 38.

39. FTB denies each and every allegation contained in Paragraph 39.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given To Private Facts)

40. In response to Paragraph 40, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 39 above, as thought set forth herein.

41. FTB denies each and every allegation contained in Paragraph 41.

42. FTB denies each and every allegation contained in Paragraph 42.

43. FTB denies each and every allegation contained in Paragraph 43.

44. FTB denies each and every allegation contained in Paragraph 44.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff In a False Light)

45. In response to Paragraph 45, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 44 above, as thought set forth herein.

46. FTB denies each and every allegation contained in Paragraph 46.

47. FTB denies each and every allegation contained in Paragraph 47.

48. FTB denies each and every allegation contained in Paragraph 48.

49. FTB denies each and every allegation contained in Paragraph 49.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

50. In response to Paragraph 50, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 49 above, as thought set forth herein.

51. FTB denies each and every allegation contained in Paragraph 51.

52. FTB denies each and every allegation contained in Paragraph 52.

53. FTB denies each and every allegation contained in Paragraph 53.

SIXTH CAUSE OF ACTION

(For Abuse of Process)

54. In response to Paragraph 54, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 53 above, as thought set forth herein.

55. FTB denies each and every allegation contained in Paragraph 55.

56. FTB denies each and every allegation contained in Paragraph 56 (a), (b), (c), (d), (e), (f), (g), (h), (i), (l) and (k).

57. FTB denies each and every allegation contained in Paragraph 57.

58. FTB denies each and every allegation contained in Paragraph 58.

SEVENTH CAUSE OF ACTION

(For Fraud)

59. In response to Paragraph 59, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 58 above as thought set forth herein.

60. FTB denies and/or is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 60.

61. FTB denies each and every allegation contained in Paragraph 61.

62. FTB denies each and every allegation contained in Paragraph 62 (a), (b), (i), (ii), (iii), (iv), (v) and (c).

63. FTB denies each and every allegation contained in Paragraph 63 (a), (b), (c), (d), (e).

64. FTB denies each and every allegation contained in Paragraph 64.

65. FTB denies each and every allegation contained in Paragraph 65.

66. FTB denies each and every allegation contained in Paragraph 66.

67. FTB denies each and every allegation contained in Paragraph 67.

EIGHTH CAUSE OF ACTION

(For Negligent Misrepresentation)

68. In response to Paragraph 68, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 67 above, as thought set forth herein.

69. FTB denies each and every allegation contained in Paragraph 69.

70. FTB denies each and every allegation contained in Paragraph 70.

71. FTB denies each and every allegation contained in Paragraph 71.

72. FTB denies each and every allegation contained in Paragraph 72.

AFFIRMATIVE DEFENSES

1. Plaintiff's First Amended Complaint fails to state any cause of action on which relief can be granted.

2. This Court lacks the necessary jurisdiction to hear Plaintiff's causes of action for declaratory and injunctive relief.

3. Plaintiff's First Amended Complaint does not adequately set forth any claim or cause of action for punitive damages.

4. Since Plaintiff has failed to plead fraud with particularity as required under Nevada law, his Seventh Cause of Action must be dismissed.

5. The issue of Plaintiff's residency for purposes of California income tax is presently the subject of an on-going administrative procedure within the State of California. The existence of that on-going administrative procedure bars and precludes Plaintiff from litigating his allegations related to residency in this Court.

6. To the extent the negligence of any party, entity or person caused any damage to Plaintiff, FTB did not negligently act or fail to act, and any such damages were therefore caused by entities and/or persons other than FTB.

7. To the extent any damages were suffered by Plaintiff as a result of the events described in his First Amended Complaint, the majority of the cause of those damages was Plaintiff's own negligence, rather than that of FTB or unnamed defendant, so Plaintiff is barred by Nevada law from recovering any sum from any party under a negligence theory.

8. Plaintiff's Second, Third, Fourth and Fifth Causes of Action are barred by the doctrines of consort, release and waiver.

9. FTB's actions in investigating Plaintiff's income tax status were privileged and conducted without malice. In its investigation of Plaintiff and dealings with Plaintiff and his representatives, FTB was simply exercising its constitutional right to collect taxes owed to the State of California with no ulterior purpose.

10. Pursuant to the Nevada Rules of Civil Procedure, during the course of discovery in this matter, FTB may

discover additional facts and/or information which justify the alteration or supplement of these responses and affirmative defenses and therefore reserves the right to amend and/or supplement this Answer as necessary in the future.

WHEREFORE, FTB prays the Court enter judgment as follows:

1. That Plaintiff Hyatt take nothing by way of his Complaint;

2. That FTB be awarded reimbursement for the attorneys' fees and costs it has incurred and will incur in the defense of this matter; and

3. For such other and further relief as this Court deems necessary and appropriate under the circumstances of this case.

DATED this ___ day of August, 1998.

McDONALD CARANO WILSON
McCUNE BERGIN FRANKOVICH
& HICKS

By _____
MATTHEW C. ADDISON
241 Ridge St., Fourth Floor
P. O. Box 2670
Reno, Nevada 89505

[Certificate of Service Omitted In Printing]

CASE NO. 98-A382999

DISTRICT COURT

CLARK COUNTY, NEVADA

-oOo-

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA Defendant.	REPORTER'S TRANSCRIPT OF PROCEEDING

BEFORE THE DISCOVERY COMMISSIONER

THOMAS W. BIGGAR

MONDAY FEBRUARY 22, 1999

9:40 a.m.

* * *

[23] COMMISSIONER BIGGAR: The attorney-client privilege will still remain, and it has been asserted throughout the depositions. And if there are particular questions that want to be challenged at the conclusion of this deposition procedure or other, then I would look at specific questions and make specific rulings on whether or not an appropriate privilege was utilized at one time. But I would rather go into specifics, and it's extremely difficult to make some broad peremptory ruling on attorney-client privilege and before we start the deposition. Happy to do it on specific questions with specific arguments on each one.

Now, as far as the Sheila Cox deposition is going, it's a difficult matter. I understand that there's a lengthy record, and on the other hand, after reading the deposition thus far, I agree with some of the points that the plaintiffs made, I agree with some of the points the defendants have made in what's [24] causing the deposition to go as it has.

And I think that what I'm going to do is I'm going to, at this point in time, allow four more days, but I will not prevent the plaintiffs from returning to seek more. But I want to have the deposition questioning tightened up a little more. And given the fact that by now, given the number of days that have gone by since the last deposition, I'm sure Miss Cox has been boning up and will be able to answer a little more fully, and we won't have to have quite as many I don't remembers and don't recalls and will be a little more familiar with the records and be – all sides will be a little more facile in handling the records and getting the thing done.

And so I'm going to have you compress, Mr. Bourke, or whoever else is going to be doing the questioning on behalf of the plaintiff to, you know, tighten up a little bit and maybe – you know, as I read the deposition, the questioning did not go way out of bounds on these things. It did not. You know, occasionally there would be a couple of questions off the track, and we can get rid of those. Let's just stick to the key elements and go from there, and let's not be fishing quite as much even though some fishing is certainly allowed.

* * *

[26] problem, that's why I like to have the video depositions, because it's a little easier to see who is doing what if that comes up. So I will look at them in the future,

if necessary, but let's just try and get the discovery down on the merits of the case.

Mr. Hutchison.

MR. HUTCHISON: One point of clarification. Your ruling concerning related taxpayers relates to all discovery matters?

COMMISSIONER BIGGAR: Correct – I mean yes.

MR. HUTCHISON: I mean, for depositions, document requests, interrogatories.

COMMISSIONER BIGGAR: Correct.

MR. HUTCHISON: And that's all we have. Thank you, Your Honor.

MR. BOURKE: Your Honor, I wanted to make one request of the FTB through the Court, and that is for any documents filed that they not disclose Mr. Hyatt's income. If they want to file and discuss it with the Court, I would appreciate it if they put it under seal because there have been documents filed expressing Mr. Hyatt's income in 1992 and 1991, despite all these misdemeanors that they are talking about.

COMMISSIONER BIGGAR: Well, let's do this. Has there been a ruling sealing this file yet or not? [27] Was there some argument with the Court on that? I know we filed – there have been a couple of motions filed under seal and all. We have some confidentiality. I think we will have the files sealed for the Court file. And I don't know at this point in time, and for in the future I don't think there's any reason, at least in the discovery area, to

discuss specific figures on that. I mean, if discovery problems come up, I know generally what we're talking about. You know, we're not talking about $12 here that we have all these attorneys. So, Mr. Leatherwood, can you –

MR. LEATHERWOOD: Your Honor, I have no problem with that. If we inadvertently disclosed something, it was just purely because I'm over in Los Angeles and sometimes it's hard for me to file stuff here.

COMMISSIONER BIGGAR: All right. We will just do it that way, keep it under seal.

MR. HUTCHISON: Your Honor, is that an order moving forward as well, the files under seal?

COMMISSIONER BIGGAR: Yes. That means it won't be available to the public to get at the clerk's office. Counsel will be able to look at it.

MR. BRADSHAW: Okay. I can understand where in some matters either side might want to be filed [28] under seal and kept confidential, and we're willing to meet with counsel and work out a stipulated confidentiality order to cover the entire litigation, but I would like opportunity to do that before we have a blanket order sealing the entire Court file.

My concern is that when a file has to be maintained confidential and sealed, that puts a burden on the attorneys and their staffs subject to contempt of court that's not otherwise there. And I would like to have discussion with counsel about the need and scope of all that.

COMMISSIONER BIGGAR: Well, I know – believe me, I know that the whole file does not need to be under seal. I'm aware of that. I thought it would easier for

counsel if once you have the idea that it's under seal that everything will come over like that and –

MR. HUTCHISON: Right.

COMMISSIONER BIGGAR: Believe me, I'm not doing it as to bring up a hammer so that the sides can then begin saying that they didn't do, they did, they filed something, you know, and didn't note that it was under seal, and they want sanctions. That's not the purpose of this.

The purpose of it is to, you know, assure [29] some confidentiality for both sides here. Particularly the individual, I guess, but for both sides, for their benefit, and to be able to allow you to argue and put in your briefs a little more freely and not be worried about everything that you're including in a brief or something.

MR. HUTCHISON: Right.

MR. BRADSHAW: So I understand, what you're doing is sealing the Court file, you're not entering a broad order regarding confidentiality?

COMMISSIONER BIGGAR: That's right, and you gentlemen can work that out.

MR. BRADSHAW: And I might point out that in counsel's papers they criticize us for not filing one of our oppositions under seal. Although it didn't have in parentheses "filed under seal," it was filed under seal.

COMMISSIONER BIGGAR: That's why I say if you just get so you do that, then we won't have any problem.

MR. HUTCHISON: I just want to make sure clear that we're real clear here. In the future we need to file, then, matters in this case under seal.

COMMISSIONER BIGGAR: Filed under seal, that's correct. All right.

* * *

ORD
THOMAS R. C. WILSON, ESQ.
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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : A382999 Dept. No. : XVIII Docket No. : F **PARTIAL JUDGMENT ON THE PLEADINGS** Date of Hearing: April 7, 1999 Time of Hearing: 10:00 a.m. (Filed April 16, 1999)

The Defendant's Motion for Judgment on the Pleadings having come before the Court on the 7th day of April, 1999, the Defendant being represented by Thomas R. C. Wilson, Esq., James W. Bradshaw, Esq., Felix Leatherwood, Esq., and George Takenouchi, Esq. and

the Plaintiff being present in court and represented by Thomas L. Steffen, Esq., John T. Steffen, Esq., Thomas K. Bourke, Esq., and Donald Kula, Esq., and the Court having considered the Defendant's Motion, the Plaintiff's Opposition, the Defendant's Reply, the Plaintiff's Surreply and the Defendant's Response to Surreply and the supporting authorities, as well as the oral arguments of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Judgment on the Pleadings is granted as to the Plaintiff's First Cause of Action for Declaratory Relief, the Court lacking subject matter jurisdiction. The Motion is denied as to the Second through Eighth causes of action.

IT IS FURTHER ORDERED that the discovery stay is lifted and that the parties may proceed with discovery to commence within a reasonable time following the April 7, 1999 hearing. The Defendant's responses to outstanding requests to admit facts and document requests served by the Plaintiff on February 22, 1999, prior to the stay of discovery, shall be served on or before April 19, 1999.

Dated this 16 day of April, 1999.

/s/ James Brennan
DISTRICT COURT JUDGE

Submitted by:
McDonald Carano Wilson
McCune Bergin Frankovich &
Hicks, LLP

/s/ Bryan Clark
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : A382999 Dept. No. : XVIII Docket No. : F Date of Hearing: April 7, 1999 Time of Hearing: 10:00 a.m.

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order was entered in the above matter

on the 19th day of April, 1999, a copy of which is attached hereto.

DATED this 20th day of April, 1999

McDonald Carano Wilson
McCune Bergin Frankovich
& Hicks LLP

By: /s/ Bryan Clark
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Nevada State Bar #1568
MATTHEW C. ADDISON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

No. A382999

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive,

Defendants.

_____//

Pages 1 through 250, inclusive.

VIDEOTAPED DEPOSITION OF CAROL FORD

May 4, 1999

VOLUME I

CERTIFIED COPY

REPORTED BY:

LINDA VACCAREZZA, RPR, CSR NO. 10201

* * *

[151] MR. BOURKE: Q. Is that case that you did good work on that related to the one million dollar assessment, is that a different taxpayer than the one you spent over 600 hours assessing?

A. Yes.

Q. Do you know how many hours you spent on that case with the most hours? Was it 700 hours?

[152] A. It could have been at the end, yes.

Q. Could it have been 800 hours?

A. I don't recall.

Q. Is there something at the Franchise Tax Board called the CBR or cost benefit ratio?

A. Yes.

Q. Could you tell me what that is?

A. It was a method that was used – we'll call it the olden days, that how many – let's see, somehow it was a calculation of how much tax was being generated based upon how many hours were involved in the case.

Q. Okay. And could you tell me how you learned about the CBR or cost benefit ratio?

A. It used to be discussed.

Q. When was it discussed?

A. When I was a new auditor.

Q. And did it stop being discussed at a certain time?

A. Yes. The emphasis went away from that, and I believe it had something to do with the Taxpayer Bill of Rights.

Q. Could you tell me what about the Taxpayer Bill of Rights had anything to do with the cost benefit ratio?

[153] A. I can't really tell you the answer to that.

Q. What was the cost benefit ratio that auditors were expected to live up to during the time it was discussed in the residency program?

A. I'm not – I'm trying to remember. So just a minute. It could have been like $350 per hour. But I could be very wrong on that.

Q. Could it have been $1,000 an hour?

A. I've never heard that figure.

Q. $600 an hour?

A. I don't think I've – I remember 350 and I remember 500. But I don't remember – and I don't remember specifically when that was.

Q. Were people requested to keep the CBR in other than written form? Were you discouraged from writing down the CBR?

A. I don't ever remember seeing the CBR written down.

Q. Did you ever hear the managers of the Franchise Tax Board residency program talk about a CBR goal or objective for auditors?

A. I don't think so.

Q. Do you remember Mr. Illia talking about a CBR at all?

[154] A. He could have.

Q. Was the CBR supposed to be kind of a minimum figure that you're supposed to drop an audit if it didn't

look like you were going to meet the $350 or $500 an hour objective?

A. I believe we evaluated the case at the beginning and determined how many hours we thought we were going to be devoting to the case prior to opening an examination.

Q. Does a typical residency case take about 100 hours?

A. That's our goal.

Q. The goal is to make a residency case complete by the end of 100 hours?

A. Yes.

Q. Do you know whether or not the residency program has ever had a taxpayer with as large a tax assessment as Gil Hyatt?

A. I don't have access to that knowledge. I don't know.

Q. You're not aware of any as large as his?

A. No.

MR. WILSON: Well, I have to object. Did you understand the question?

THE WITNESS: Not for sure.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT H. HYATT, Plaintiff, -vs- FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and Does 1 - 100, Inclusive, Defendants.	)	CASE NO. A382999 Dept. No. XVIII

Examination of DARLENE BEER, taken at 300 South Spring Street, Sixth Floor, Los Angeles, California, commencing at 1:35 p.m., Thursday, August 26, 1999, before Gail E. Ferguson, CSR No. 7742.

* * *

[5] EXAMINATION

BY MR. TAKENOUCHI:

Q Good afternoon, Ms. Beer, Thank you for coming to my office at the request of Mr. Dameron. The purpose of this meeting is to permit you to make a record and for us to record your statement that you previously provided Mr. Dameron concerning certain matters.

When the interview is completed the court reporter will prepare a transcript of this meeting. Mr. Dameron will then transport that statement for you to review and acknowledge the accuracy of your statement.

I will store the statement for your protection in the future. Although this is an informal interview, you are not giving a statement under penalty of perjury, we are asking you to provide an honest and complete statement. So can you do that for us?

A Yes.

Q Please state your name for the report?

A Darlene Beer

Q Do you have a middle name?

A Louise

Q Okay. Where do you currently live?

A 642 East Culver, Orange, California.

Q And how long have you lived there?

A 52 years.

[6] Q Are you currently employed?

A Sort of.

Q Part time?

A Yeah. A couple hours a week I'm a secretary for a Mexican restaurant.

Q Who do you live with?

A My husband. And you don't want to know the rest of them. My daughter and two grandsons.

Q At any time did you receive a commission to be a notary public?

A Yes.

Q Can you tell us the facts and circumstances about when you received the commission to become a notary?

A I worked in a bank and they liked to have a notary there and they asked me to be one.

Q How long have you been a notary?

A A real long time. I worked at Sanwa for 33 years and I was a notary there probably in the '80s that I first got my commission.

Q Based on the Secretary of State's information we were informed that your last commission was effective from December 6, 1991 to December 5, 1995; is that true?

A That's true.

Q. What do you recall about your notary commission during this period?

[7] **Let me ask you this: were you working at Capital Bank located at 4875 La Palma Avenue, La Palma, California at the time of this notary commission?**

A Yes, and it's for customer service.

Q Did you inform our investigator, Mr. Dameron, that you were employed by Capital Bank from September 1991 through September 1993?

A Yes.

Q Is it your understanding that Capital Bank was closed approximately one year after you left?

A Yes.

Q I'll show you a copy of a document that we'll mark as Exhibit 1.

(Exhibit 1 was marked for identification.)

MR. TAKENOUCHI: Q Now, does this document, this Exhibit 1 bear the number in the upper right-hand corner DOC #93-0404104?

A Yes.

Q Did Mr. Dameron previously show you this document?

A Yes

Q Does this document bear your signature and notary stamp?

A Yes.

Q Where did you sign this document? When did you [9] **sign this document, excuse me?**

A When did I sign it?

Q When did you sign the document, can you recall?

A June of '93.

Q I'll direct you to the bottom half of the page where it says October 1, 1991. Does this state in part that, "on October 1, 1991 before me, Darlene Beer, personally appeared Gilbert P. Hyatt personally

known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument," is that right?

A Yes.

Q. Did Mr. Hyatt come before you on October 1, 1991?

A No.

Q Did Mr. Hyatt sign this document in your presence on October 1, 1991?

A No.

Q Did you witness Mr. Hyatt sign this document on October 1, 1991?

A No.

Q Did you sign this document on October 1, 1991?

A No.

[9] **Q I'll hand you a copy of a document which is to be marked Exhibit 2.**

(Exhibit 2 was marked for identification.)

MR. TAKENOUCHI: Q Does this document, Exhibit 2, bear the document number 93-0404104 in the upper right-hand corner?

A Yes.

Q Did Mr. Dameron previously show you this document?

A Yes.

Q Does this document bear your signature and notary stamp?

A Yes.

Q When did you sign this document?

A June 1993.

Q I direct your attention to the bottom half of the page where it states October 1, 1991. Do you see that?

A Yes.

Q Does this state in part that, "On October 1, 1991 before me, the undersigned, a notary public in and for said county and state personally appeared Grace Jeng, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledge to me that she executed the same." Do you see that on the bottom of the page?

* * *

[14] **In this document you acknowledged Ms. Jeng's signature on June 10, 1993, is that true?**

A Yes.

Q Did you, in fact, notarize the document on June 10, 1993?

A Yes.

Q Did Ms. Jeng sign Exhibit 2 in your presence on June 10, 1993?

A Yes.

Q Directing your attention to page 18, column six, does this state "Identification of Signer?"

A Yes.

Q And this is Exhibit 3?

A Yes.

Q Looking down at page 18, row four, column six, of Exhibit 3?

A Yes.

Q Column six states, "Identification of Signer." Looking down the page to row four, column six, it is marked CDL CO 317886, dob 8/31/47; is that correction?

A Yes.

Q Is that in your handwriting?

A Yes.

Q What does that notification mean?

A That's their identification, it's a California [15] driver's license number CO31786, and dob is date of birth 8/31/47.

Q Looking across row four to column seven, what information is contained in those two boxes?

A The address of the person that signed the book,.

Q And column eight?

A Is the fee that's charged, the notary fee.

Q Looking across row four, column nine, there is a notation, "doc dated. 10/1/91."

A 10/1, that's correct.

Q Does it state that at the top of the page on column nine that's "Additional Pertinent Information?"

A Yes.

Q Okay. On row four, column nine, there's a notation that states, "10/1/91 w/Mr. Hyatt."

A Yes.

Q What does that mean?

A That means the document was dated 10/1 of '91 and Grace Jeng came in with Mr. Hyatt.

Q Did Mr. Hyatt appear in your place of business with a person who identified herself as being Grace Jeng on June 10, 1993?

A Yes.

Q In the presence of Mr. Hyatt were you requested to acknowledge the signature of Grace Jeng on a Short Form [16] **Deed of Trust?**

A Yes

Q In the presence of Mr. Hyatt did you indicate that Grace Jeng's signature was acknowledged before you on October 1, 1991?

A Repeat that please?

Q In the presence of Mr. Hyatt did you indicate that Grace Jeng's signature was acknowledged before you on October 1, 1991?

A No.

Q Did you indicate the document in your notary log that the Short Form Deed of Trust was dated October 1, 1991?

A Yes.

Q Directing you to box marked five on page 17.

A Yes.

Q Does this box marked five consist of 10 columns that run across page 17 to and through page 18 and end with another box marked five?

A Yes.

Q Reading from the left does the first column on the top of page 17 state "Act:Mo/Day/Yr/Time?"

A Yes.

Q Going to the row or box marked five and going over the first column to the left does it say, "6/10/93?"

[17] A Yes.

Q Did you write that on page 17?

A Yes.

Q Does this mean June 10, 1993?

A Yes.

Q Based on this notation what happened on June 10, 1993?

A I acknowledged a signature.

Q Going to the top of the page to column two marked "Act:Kind or Type," do you find that?

A Yes.

Q What does this mean?

A Acknowledgment, I acknowledged a signature.

Q Did you write acknowledgment in that box?

A I wrote that.

Q Okay. Did you write that on page 17?

A Yes.

Q Okay. Did you write that on June 10, 1993?

A Yes.

Q Based on this notation what happened on June 10, 1993?

A I notarized a signature of 6/10/93.

Q Directing your attention to the top of page 17, column three, do you see "Document: Mo/Day/Yr," do you see that?

* * *

[22] **Q Did Mr. Hyatt sign Exhibit 7 in your presence on September 4, 1992?**

A Yes.

Q Okay. Let me show you another exhibit, these pages consist of Exhibit 4.

(Exhibit 4 was marked for identification.)

MR. TAKENOUCHI: Q Can you please look at Exhibit 4 which consists of four pages. Do you recognize this person to be Gilbert Hyatt?

A No

Q Before June 10, 1993 did you know Mr. Hyatt?

A Yes.

Q Do you know who Mr. Hyatt is? Do you know who Mr. Hyatt is?

A No.

Q Do you know Ms. Jeng's relationship with Mr. Hyatt?

A No.

Q Did Mr. Hyatt sign your notary log document in your presence?

A Yes.

Q When you acknowledged his signature?

A Yes.

Q Could you please look at Exhibit 1 again?

A Yes.

Q Is this a document that Mr. Hyatt requested you [23] to acknowledge his signature on June 10, 1993?

A Yes.

Q Did you, in fact, notarize this document on June 10, 1991?

A Yes.

Q Directing your attention to Exhibit 3, page 18, and that's Exhibit 3, page 18, column six, does it state "Identification of Signer?"

A Yes.

Q If you look down to row five, column six, it's marked "N-e-v L-i-c R 253 810."

A Yes.

Q Is that in your handwriting?

A Yes.

Q What does this notation mean?

A Nevada license number R 253810.

Q Look at that notation in the same box, 473861999938. Did you make this notation?

A Yes.

Q What does this notation mean?

A I don't remember.

Q Looking across to row five, column seven.

A Yes.

Q What information is contained in that box?

A Mr. Hyatt's address.

[24] **Q Who entered that information?**

A He did.

Q That's in his handwriting?

A It's in his handwriting.

Q Looking across row five to column nine there's a notation, "doc dated 10/1/91, customer known to DB. Customer has safe dep. boxes."

A Right.

Q What does this mean?

A The document was dated 10/1 of '91 and the customer was known to Darlene Beer. Customer has safety deposit boxes at the bank.

Q Did Mr. Hyatt appear in your place of business with a person who identified herself as being Grace Jeng on June 10, 1993?

A Yes.

Q In the presence of Ms. Jeng were you requested to acknowledge the signature of Gilbert Hyatt on a Grant Deed?

A Yes.

Q In the presence of Ms. Jeng did you acknowledge the signature of Gilbert Hyatt before you on October 1, 1991?

A Please repeat?

Q In the presence of Ms. Jeng did you indicate [25] that Gilbert Hyatt acknowledged his signature before you on October 1, 1991?

A No.

Q Did you in fact document in your notary log that the Grant Deed was dated October 1, 1991?

A Yes.

Q I'll hand you a set of documents that I'll mark as Exhibit 9.

(Exhibit 9 was marked for identification.)

MR. TAKENOUCHI: Q This is a copy of your notary logbook.

A Yes.

Q Is this a true copy of your notary logbook that you surrendered to a representative of the Department of Justice and the Attorney General?

A Yes.

Q Have you had a chance to compare this with the original?

A Yes.

Q I will hand you another document that will be marked as exhibit 10.

(Exhibit 10 was marked for identification.)

MR. TAKENOUCHI: Q Exhibit 10 is another copy of your notary logbook. Have you had a chance to compare Exhibit 10 with the original notary logbook?

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Defendant.	)	Case No. 98-A-382999-C

BEFORE DISCOVERY COMMISSIONER
THOMAS W. BIGGAR

Taken as the Discovery Commission
200 South Third Street, Fourth Floor
Las Vegas, Nevada

On Tuesday, November 9, 1999
at 10:07 a.m.

Reported by: Margie L. Carlson
CCR No. 287

* * *

[53] think the deliberative privilege has been completely distorted as a result of any realization of what it was, particularly in a case where the process of the audit is itself at issue in the case.

MR. LEATHERWOOD: And that's where the rubber really does meet the road, and that's where I have a fundamental difference with the Court, not only with the discovery commissioner but the trial court here, that in the state of California in order to probe to find out what

were the audit findings, audit criteria, those kinds of disclosure you are precluded under California law.

The focus of our arguments there, at least as my understanding of the deliberative process was really an umbrella objection saying that the executive of the state of California has an inherent right to raise and collect these taxes and investigate individuals who are in some way not paying their taxes.

Now, we have a substantial, a wealth of evidence to show that Mr. Hyatt not only evaded his taxes but fraudulently evaded his taxes, and whether or not we have to come to Nevada to collect it, that's one issue, but for a Nevada court to authorize proceedings in which every administrative [54] officer is asked point by point questions as to why did they engage in certain behavior is really intruding into the entire thought processes. It's because for one thing how can they freely think about the entire process and examine a particular taxpayer, particularly when it's one that is determined not to pay his taxes as Mr. Hyatt.

COMMISSIONER BIGGAR: Let me ask you this, Mr. Leatherwood. If a tax examiner says, for instance, in a hypothetical case, we don't think we have a very good case, but let's tack on a fraud penalty and that will make the taxpayer settle, is that something that should be examined?

MR. LEATHERWOOD: Your Honor, and if that was the case that taxpayer – that tax auditor would be subject to significant, significant liability not only with this agency but maybe in other legal matters. However, there is an entire process here that is available to Mr. Hyatt rather than having the state of Nevada determine

whether or not a particular process makes sense or not. There is a long, entire process that Mr. Hyatt has done his best to undermine and preclude us to proceed, including this confidential –

COMMISSIONER BIGGAR: Protective order.

[55] MR. LEATHERWOOD: – protective order, which he has presented a protective order which he has not shown one single instance why this Court should have a heightened concern for confidentiality as opposed to any other taxpayer in this country or that may be involved in a legal proceeding.

All he has done is he has walked in here and said he has these concerns, when we in fact we know Mr. Hyatt has concocted a scheme in which to evade the enforcement of taxes, what he has done he has raised the state of Nevada to preclude that tax from being enforced. Now, they have, Mr. Hyatt has examined the auditor for nine days, has reviewed this file, and they have not come up with one instance in which someone said, "We are going to lay on this tax even though, even though Mr. Hyatt doesn't deserve this tax." That has not even been –

COMMISSIONER BIGGAR: You are saying there is nothing like that in the file?

MR. LEATHERWOOD: I haven't seen it. I have not seen any evidence of that nature.

COMMISSIONER BIGGAR: Well, I am kind of confused on why the file shouldn't be an open book, Mr. Leatherwood. If there is nothing to conceal why [56] shouldn't the process be open to the taxpayer when they are claiming that there is fraud. You are claiming that he is defrauding you. He is claiming that your conduct is

fraudulent. I say yours, the FTB's conduct is fraudulent. I can't say I completely agree with you that all of the taxpayer's machinations here, however they are done, should be completely explored, and you are certainly entitled to do that.

I am concerned, and I think there is concern countrywide about the tax collecting services using methods that are not appropriate and, you know, we all are completely aware of that in regard to the IRS and methods like that, and I think that these processes should be explored in the proper context.

You indicate that Mr. Hyatt has all of his rights and remedies in California to challenge the tax. I don't know if those rights and remedies include exploration of the process and availability to all the information that he could get by way of the claims that the Court has left intact here. If there is fraud to be discovered, I think it should be discovered on one side or the other.

MR. LEATHERWOOD: So then why don't you [57] let us discover their fraud? How come you have crippled us with a protective order?

COMMISSIONER BIGGAR: I don't believe I have crippled you, Mr. Leatherwood. I just today upon your motion granted your entire motion to compel subject to the protective order which certainly does not preclude you from getting all the information that you have requested, and in fact you will get it. It's a question of disbursement. That has nothing to do with your inability to obtain the information. However, the argument here is you don't want to give them the information at all.

MR. LEATHERWOOD: No, in fact we have provided them with, on four separate occasions. What the process is going on here is what is the thinking process, what is the evidence of the thinking process of the people that were involved in the assessment process even as it is continuing on now.

COMMISSIONER BIGGAR: But you never answered my original hypothetical question about if there were attempts to obtain taxes in some kind of fraudulent fashion as I believe would be the case if the attempt would have been made to say, you know, if you don't pay we are going to assess a fraud [58] penalty on you, even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us. Now, in my view that would be an improper way of collecting taxes, but I think that you should be able to explore and find out whether or not that in fact happened. If it did or if it did not happen.

MR. LEATHERWOOD: In the middle of the process itself, in other words, Mr. Hyatt can circumvent entirely a laid-out administrative process including remedies available in California courts to have a Nevada court come in and supervise the administration of California tax law?

COMMISSIONER BIGGAR: Well, because the way Nevada got involved in this way by acts done by the FTB in Nevada. Nobody disputes that certain acts were done in Nevada in the process of collecting this tax, or let's not say collecting. Nothing has been collected yet I guess, in assessing the tax, and that's what, that's why you are here. That's why you are here.

MR. LEATHERWOOD: There is no doubt about it.

COMMISSIONER BIGGAR: Believe me I wish [59] you weren't here.

MR. LEATHERWOOD: But, but, not to cut it off, to answer your question quite frankly, everyone knows in my office I am more of a taxpayer advocate than any other attorney around here. I take the harder cases. I take the tougher cases, but generally I'm the one, if I see there is some merit in a taxpayer's claim, the taxpayer will generally get a break, and if I as an auditor, if I had violated a taxpayer's rights and there were remedies available in the law, then I would encourage the taxpayer to take these remedies, but in this particular case I know for a fact that Mr. Hyatt has crafted, has concocted a scheme by which to avoid payment of the California taxes.

Now, whether or not –

COMMISSIONER BIGGAR: I'm not sure however, Mr. Leatherwood, that in the zeal to collect taxes which the state of California is positive they are entitled to, and I don't think that's too strenuous of a word to use. I think that all the investigation here that has been conducted has led a number of people in the tax collecting process to be as competent as you are and as warm to the subject as you are, that taxes are owed, that [60] that thereby justifies procedures that may not be strictly within the rules to collect those taxes.

MR. LEATHERWOOD: That didn't occur here.

COMMISSIONER BIGGAR: Well, then I think we need to find out what was done exactly and then let the jury or the judge decide if that occurred or not.

MR. LEATHERWOOD: Well, they have taken 20-something depositions. They haven't found anything yet, and now –

COMMISSIONER BIGGAR: Perhaps it's in these documents you don't want to turn over.

MR. LEATHERWOOD: Well, you have had a chance to review those documents.

COMMISSIONER BIGGAR: I don't think you want my opinion on it, Mr. Leatherwood.

I am concerned. We got off the track here with the deliberative process, and I guess what I can say is I don't agree with the defendants as far as the deliberative privilege being invoked here, and I also take into consideration all of the arguments made by the plaintiff concerning whether or not there even is a deliberative privilege given the newer California law and freedom of information and what information should be available.

[61] I also disagree with the defendants in their assertion or their definition of the audit file itself and what is and can be encompassed in that. I think that the audit file, anybody's reasonable interpretation of it would be all of the information gathered during the audit process that had to do with the imposition of the proposed tax on Mr. Hyatt in this particular case.

So I find that Anna Jovanovich is – you know, I'm not sure how to characterize her except as she is a critical witness in the case. She has played a major role in the handling of the audit both in advice and, well, I guess an advisory capacity and then in a capacity which I find, in disagreeing with Mr. Bradshaw's argument, that she is in effect reviewing her own findings as a protest officer on

the legitimacy – or legitimacy is not the right word but at least the regularity and the accuracy of the initial audit which she was also heavily involved in.

I am concerned and I guess I need to have a little bit more say on this part on the Jovanovich deposition. After reading comments from her in her deposition I am still completely amazed at why she was not produced immediately for deposition and what [62] the FTB's, the FTB's assertion that they didn't know how to get ahold of her was I think grounds for sanctions in this particular case, if nothing else has been, and particularly with the continued involvement that she had after she left the office, her retention as a consultant in this case, and then to have counsel for the FTB come in and say, "We don't know how to get ahold of her. She is under a witness protection type of program," and then that same person, Jovanovich, you know, now we are claiming that attorney-client information.

MR. LEATHERWOOD: Your Honor –

COMMISSIONER BIGGAR: Mr. Leatherwood, you are the one who made the representation that she wasn't available and that will –

MR. LEATHERWOOD: I know for a fact that there was no, there was no way I could get ahold of Miss Jovanovich.

COMMISSIONER BIGGAR: How did you get ahold of her to act as a consultant?

MR. LEATHERWOOD: As I represented to the Court before, I contacted Terry Collins.

COMMISSIONER BIGGAR: Why couldn't you contact him this time?

MR. LEATHERWOOD: I did contact Terry [63] Collins. No one knew how to get ahold of Anna Jovanovich.

COMMISSIONER BIGGAR: So after she provided you with those lengthy memos then she disappeared?

MR. LEATHERWOOD: This is more than a year and a half later, Your Honor.

COMMISSIONER BIGGAR: What was more than a year and a half later?

MR. LEATHERWOOD: When plaintiff attempted to take the deposition of Miss Jovanovich was more than a year and a half after I had my last communication with her. I think when Mr. Bourke took the deposition of Anna Jovanovich she asked me when was the last time she spoke to me. She said a year and a half ago. Mr. Bourke asked Anna Jovanovich when, what was the last time Mr. Leatherwood got ahold of her, and she said, "It's impossible for Mr. Leatherwood to get ahold of me." It was impossible for me to know how to get ahold of her or to get ahold of her.

COMMISSIONER BIGGAR: There was no witness protection like their –

MR. LEATHERWOOD: I did not make that representation to this Court, but I'm not going to [64] back off the representation. What, literally how that occurred is that it was the musing of two attorneys where we were talking about where was Anna Jovanovich, and I represented, I said, "I don't know. She is under some kind of

close scrutiny. They are concerned about her exposure to various taxpayers and she is into some kind of protection."

I later understood that representation was made in court of a witness protection program. Now, when I first heard about it, the representation that I made to the Court was simply that there is no such thing as a witness protection program. However, I have never gone into the details or the contours of my conversation with Anna Jovanovich or any attorneys who are employed by the attorney general's office in this matter because that's a matter of our own communication.

COMMISSIONER BIGGAR: I thought she had testified Mr. Collins had her number.

MR. LEATHERWOOD: Mr. Collins had a number on which he could leave a message and Mr. Collins did leave a message for her, and what occurred, she told us not to give out her telephone number or her address, and it was my understanding that the FTB is duty bound by California law not to [65] disclose retired persons' personal information including their address.

COMMISSIONER BIGGAR: Let me ask you this, Mr. Kula, if you want to address this, you indicated in your brief that Miss Jovanovich testified about advice that she gave to the auditors and stuff. Am I right in that, or am I making the wrong –

MR. KULA: Advice she gave the auditors?

COMMISSIONER BIGGAR: Right.

MR. KULA: She certainly had discussions on the privilege.

COMMISSIONER BIGGAR: No, I meant that she testified about things she told the auditors and so forth in her deposition thus far, or Mr. Bourke.

MR. BOURKE: Yes, Your Honor, I don't think she went into great detail about it though. She did testify she was asked questions and she answered them.

COMMISSIONER BIGGAR: No, that's not what I meant. Did she testify about anything she told the auditor?

MR. BOURKE: Yes, she was asked questions about the audit and she answered the questions, but she didn't recall the specifics about what she told.

[66] COMMISSIONER BIGGAR: I'm a little confused. You asked her questions.

MR. BOURKE: I asked her questions.

COMMISSIONER BIGGAR: And she testified about advice she gave to the auditors; is that right?

MR. BOURKE: Yes.

COMMISSIONER BIGGAR: But she didn't recall –

MR. BOURKE: The details.

COMMISSIONER BIGGAR: – the details, and she had not reviewed any documents in preparation for her testimony, or do you remember what that –

MR. BOURKE: I don't remember what she reviewed.

COMMISSIONER BIGGAR: Well, she did say she had reviewed documents?

MR. BOURKE: I don't remember one way or the other.

Oh, yes, Your Honor, one thing she did testify that she reviewed was the handwritten notes of her conversation with Eugene Cowan, and she did use those to refresh her memory, and those were produced.

COMMISSIONER BIGGAR: She said she had [67] reviewed notes of conversations with Mr. Cowan?

MR. BOURKE: Yes.

COMMISSIONER BIGGAR: Well, let me ask you this, do you have the same – you or Mr. Kula can answer this. How about Mr. Gould, do you think he acted in any kind of different capacity in giving advice that Miss Jovanovich did?

MR. BOURKE: No, Your Honor, I think he and Miss Jovanovich worked behind the scenes as a team. Miss Jovanovich I would say had two or three times as much contact with the auditors as Mr. Gould. For example, the very first time that the auditors went to the legal department was in October of 1993 when they sent the progress notes they sent the entire file up to Miss Jovanovich and Mr. Gould.

COMMISSIONER BIGGAR: That was Mr. Shayer?

MR. BOURKE: Mr. Shayer sent it to Anna Jovanovich, and the person returning the message to Anna was Mr. Gould, and that's why the privilege log then

reflects a privileged communication from Mr. Gould to Mr. Shayer, but the original memo was directed to Anna Jovanovich, and since I took her deposition I wanted to tell you I learned through [68] hard experience how to pronounce her name. Everyone is saying Jovanovich. She says it's like a Y-o, Jovanovich.

COMMISSIONER BIGGAR: All right, thank you.

MR. KULA: Your Honor, one thing I'll just ask in regard to this issue of Miss Jovanovich and Mr. Gould, I do have copies of these three cases I want you to have, and I can give copies to the Court and copies to the opposing counsel.

COMMISSIONER BIGGAR: One of the troubles I have in this case and the reason I'm so slow on making some rulings in this case is because I get a lot of information, particularly from plaintiff's side, and whereas in the supreme court as my last recollection of the supreme court of the state of Nevada, the maximum length of a brief you can even submit is 30 pages, and I think that's usually fairly important issues when it gets to that point, but here anytime there is a motion made I get at least 50 pages of briefing material and at least – well, you know, binders full of exhibits and case law.

MR. KULA: I can simply submit the most relevant case I mentioned, Texico Puerto Rico.

[69] COMMISSIONER BIGGAR: I will look at that case as well.

Well, Mr. Leatherwood, did you have anything to add on that point?

MR. LEATHERWOOD: No, because I haven't seen the cases and I haven't seen the supplemental brief, but I do have something to add on the point on this Anna Jovanovich and Gould matter.

At some point in time the Court's going to have to determine whether or not the FTB legal staff, our lawyers, have privileges and the rights of an attorney representing their clients or not, and this is one of those situations. Mr. Gould's memos have been available for the auditors so he was acting as a lawyer for his department, and just, if I could just drift for one minute back to Jovanovich and the deposition, I would like to remind the Court that finally after we were able to convince Anna Jovanovich to come to California, the board and the attorney general's office paid her to come. We sent her up in Sacramento. We experienced a significant amount of our own personal costs to bring her in here, but it was very difficult for us.

COMMISSIONER BIGGAR: Do you classify her as an expert?

[70] MR. LEATHERWOOD: Pardon me?

COMMISSIONER BIGGAR: Is she an expert?

MR. LEATHERWOOD: She is a retired person, and she just couldn't afford to come over here for a deposition.

MR. KULA: The alternative was to give us her address.

MR. LEATHERWOOD: Well, once again we were challenged by the California law which precluded us from disclosing that.

COMMISSIONER BIGGAR: As far as the initial documents are concerned, I think that in this particular case there's going to be error on some side, that the Nevada Rules of Civil Procedure have the broader the discovery, the more appropriate, and I think that that is the, that should be the point of this particular case, that the discovery should be broad. Given the Court's failure to limit the issues in this case any more than the Court did, and the Court said that discovery would be – or, I mean, the Court didn't say anything about discovery, that the plaintiff was entitled to press the case in all of the counts alleged in the complaint, and in this regard I think the heart of the case is the process by which the [71] FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada.

MR. LEATHERWOOD: So if I understand the Court correctly, that activities that were exclusively performed within the state of California this Court feels it has jurisdiction over?

COMMISSIONER BIGGAR: Because it's directed at the plaintiff who I think it's unquestioned was a resident of the state of Nevada on the date on, as I understand and perhaps there is a disagreement on that, but I believe that even the state of California would stipulate and/or admit that as of sometime in 1992 that Mr. Hyatt became a resident of the state of Nevada.

MR. LEATHERWOOD: We now have evidence that Mr. Hyatt was residing at his address in 1992.

COMMISSIONER BIGGAR: And all of the auditing and all of the processing that took place in this whole case arose, what, '94, '95?

MR. KULA: '93, '94.

COMMISSIONER BIGGAR: '95, so in addition to that I find that the Court did not limit it just to acts taking place in Nevada, so in my view unless the Court were to change that, I guess you are right [72] in your assumption.

MR. LEATHERWOOD: Your Honor, I just want to make sure that the Court understands. I'm not trying to be antagonistic or confrontational. What I'm just trying to do is draw out the Court's thinking, okay?

COMMISSIONER BIGGAR: You got it.

MR. LEATHERWOOD: So you really have a record in which we can have –

COMMISSIONER BIGGAR: Appeal? Oh, no, I wouldn't do that.

MR. LEATHERWOOD: I'm not saying – what I'm saying –

COMMISSIONER BIGGAR: No, I have no problem, Mr. Leatherwood with that. You are entitled to know what I am thinking, and I want to let you know what I am thinking. I am trying not to just guess at the answers, but I'm trying to at least give us a basis, reasonable or otherwise.

MR. BRADSHAW: I do recall this was briefed, and Judge Saitta did tell the parties at our oral argument on the motion for judgment on the pleadings that by dismissing the first cause of action, which was basically the tax case, that that should make a difference in the

scope of discovery [73] and it seems what we are getting into is the breadth and detail of the tax administration.

COMMISSIONER BIGGAR: See, and I don't agree with that, Mr. Bradshaw. At least the way I read it is that I think the Court was not going to make a determination on what the tax was owed or whether it was imposed or proposed properly. The Court was not going to interfere with California in that regard, and which would obviously make a severe limitation on discovery.

I think that was clearly correct, you know, that problem about collecting tax that is imposed ultimately if then there was, you know, that would have to be hashed out in California and/or in Nevada in some later case if there is some judgment outstanding or something to that effect, but the process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring [74] with various Nevada companies and other things, but that in my view is only a part of the process of collecting the tax from Mr. Hyatt, and the process is what is under attack here, and I think in my view, particularly a state agency should feel that its processes should be open to exploration in a case such as this so that we have an open form of government.

In any event the ruling is going to be thusly, that I'm going to have the – that I don't find on any of the documents thus far to be a reasonable assertion of the deliberative

privilege, and the case law is clear to me that the deliberative privilege applies at higher levels at policy-making and decision-making levels that are not involved in this particular case.

Deliberative process, deliberative privilege, if it were to be available here, and I believe you can argue that it would be available, that it could be available here under Nevada law and/or case law, common law, that would not be hinged upon by California statutory law even if it were available here, this is not the situation that the deliberative privilege addresses.

This is more the administrative process

* * *

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	) Case No. A382999) Dept. No. XVIII) Docket F) **DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION**) Filed Under Seal Pursuant to the Discovery Commissioner's Ruling of February 22, 1999

Date of Conference: November 9, 1999

Time of Conference: 10:00 a.m.

NATURE OF ACTION

(Filed Dec. 27, 1999)

On November 9, 1999, the Court heard additional argument in regard to Plaintiff Gil Hyatt's motion to compel re missing, redacted, and sanitized documents from FTB's Residency Audit Files of Hyatt and Hyatt's Motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address.

[I have reviewed Defendant's proposed changes to this recommendation, submitted in the letter of 11/28/99, but find said charges to be unnecessary to their recommendations.]

APPEARANCES

At the November 9, 1999 hearing, Mark A. Hutchison, Thomas K. Bourke, and Donald J. Kula appeared on behalf of the Plaintiff, Gil Hyatt, and James A. Bradshaw, Thomas R. C. Wilson, Matthew C. Addison, and Felix E. Leatherwood appeared on behalf of the Defendant, the Franchise Tax Board of California, *i.e.* the FTB.

FINDINGS

1. The Court previously held hearings on April 20, 1999 and May 5, 1999 in regard to Hyatt's motion to compel re missing, redacted, and sanitized documents from FTB's Residency Audit Files of Hyatt and Hyatt's motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address. A Discovery Commissioner's Report and Recommendation for each of the prior hearings was signed by the

Discovery Commissioner on or about April 30, 1999 and October 26, 1999, respectively.

2. At the May 5, 1999 hearing, after listening to the oral arguments of counsel, the Court ordered post-hearing briefing in regard to certain documents the Court had reviewed *in-camera*. *See* Commissioner's Report and Recommendation of October 26, 1999, ¶ 8 for identification of the specific documents. In addition, the Court ordered that the FTB provide a privilege log to Hyatt by May 21, 1999, of all Hyatt-specific documents to which the FTB was objecting and refusing to produce to Hyatt based on privilege. The Court also ordered that the parties' respective post-hearing briefs address any new documents included on the FTB's privilege log not previously addressed by the parties or the Court.

3. On May 26, 1999, the FTB submitted a "First Supplemental" privilege log listing 29 Hyatt-specific documents to which it was objecting and refusing to produce based on asserted privileges. Hyatt submitted post-Hearing Memorandum of Points and Authorities and additional supporting papers on June 1, 1999, addressing the issues raised by the Court during the May 5, 1999 hearing as well as the new documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log. In response, the FTB submitted its Post-Hearing Memorandum of Points and Authorities and additional supporting papers on June 26, 1999. Hyatt then submitted a Post-Hearing Reply and supporting papers on July 19, 1999.

4. At the November 9, 1999 hearing, the Discovery Commissioner found that the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper

subject of discovery based on Judge Saitta's ruling on the FTB's Motion for Judgment on the Pleadings leaving intact all of Hyatt's tort claims. Specifically, Hyatt is alleging fraud, among other torts, by the FTB in the manner it audited him and assessed and attempted to collect taxes and penalties from him. Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt.

5. At the November 9, 1999 hearing, the Discovery Commissioner found that the FTB's assertions of the deliberative-process privilege as to documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log as to the FTB's assertions of such privilege during depositions in the examples provided to the Court were improper and overruled in their entirety. In making this finding, the Discovery Commissioner determined that the FTB's attempt to assert the deliberative-process privilege in this case is a distortion of the privilege, in particular because the process of the FTB audits directed at Hyatt is squarely at issue in this case. In making this finding, the Discovery Commissioner also took into consideration all arguments made by Hyatt in opposing the FTB's assertion of the deliberative-process privilege including, but not limited to, the fact that the privilege applies only to higher-level policy decisions.

6. At the November 9, 1999 hearing, the Discovery Commissioner found that the attorney-client privilege does not apply to Anna Jovanovich's work, communications, information, or documents generated or received in regard to the Hyatt audits, assessments by the FTB, and the subsequent protest proceedings for the period of time

Jovanovich was still in the employment of the FTB. This finding is based upon Ms. Jovanovich's participation throughout the FTB's audits, assessments, and protests relating to Mr. Hyatt in which Ms. Jovanovich was an integral part of the audit process, not just an attorney providing occasional legal advice on specific questions of law.

7. At the November 9, 1999 hearing, the Discovery Commissioner found that a significant showing is necessary to conclude that a crime or fraud has been committed sufficient to invoke the crime/fraud exception and find waiver of the attorney-client privilege. Hyatt's assertion of the crime/fraud exception is not frivolous in this case, but the Discovery Commissioner will not order at this time production of materials claimed to be privileged based on the crime/fraud exception.

8. At the hearing conducted on November 9, 1999, the Discovery Commissioner made findings based upon the arguments of counsel in regard to the documents submitted for *in-camera* review and the new documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log. The specific findings for these documents are set forth below in the Recommendations with reference to each document number.

RECOMMENDATIONS

9. The Discovery Commissioner makes the following recommendations as to the documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log, including those submitted for *in-camera* inspection:

a. *FTB 100126*: A portion of the redacted document is not discoverable and need not be provided to Hyatt. Specifically, the portion of the document beginning on the line where the date of 12/8/93 is stated, starting with the words "Richard Gould" through the sentence five lines from the bottom ending in "tax reporter." This protected portion of the redaction reflects advice from Richard Gould, another FTB in-house lawyer, in 1993. The Discovery Commissioner, in making this finding, draws a distinction between Mr. Gould and Ms. Jovanovich finding that, at this time and based on the existing record, Mr. Gould does not appear to be an integral part of the audit at that time. The remaining redacted information beginning with the word "discussed" through the end of the page must be produced as it does not relate to Mr. Gould.

b. *FTB 100139*: The redacted portion of the document is ordered produced as it relates to Ms. Jovanovich. It is ordered produced on the same grounds discussed above in ¶¶ 4 and 6 regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

c. *FTB 100209*: The document is a typewritten transcript of FTB 100126 discussed above. The same portions of the redacted document ordered produced in FTB 100126 will be produced here for the same reasons, the same portions of the redactions found not discoverable in the FTB 100126 are not discoverable from this document for the same reasons stated above.

d. *FTB 100218*: The redacted portion of the document is ordered produced. It is ordered produced as the one sentence redaction does not give legal advice and is not a communication relating to legal advice.

e. *FTB 100288*: This document has already been produced and no privilege attaches to it.

f. *FTB 100289 thru 100292*: These documents, a memo on sourcing compiled by Monica Embry as a response to Allen Shigemitsu's already-produced memo on the same subject, are ordered and produced as neither the attorney-client nor deliberative-process privileges are applicable, based on the same grounds discussed in ¶¶ 4 thru 6 above.

g. *FTB 100401*: This is a duplicate of FTB 100218. The same ruling for FTB 100218 applies to this document.

h. *FTB 100908 thru 100909*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed above in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

i. *FTB 101634 thru 101645*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

j. *FTB 101646 thru 101656*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

k. *FTB 104117 and FTB 03096 and FTB 104122 and FTB 03091*: These documents are Carol Ford's review notes. These documents are ordered produced in

their entirety. The FTB asserted the deliberative-process privilege, but deliberative process privilege is inapplicable for the reasons set forth in ¶ 5 above. Given that there is no applicable privilege, there is no reason for the Discovery Commissioner to review these documents *in-camera*. The documents are to be produced directly to Hyatt.

l. *FTB 07381*: This document is ordered produced without redactions. It is a memorandum prepared by Ms. Jovanovich while employed by the FTB and working on the Hyatt audits. It is ordered produced on the same grounds discussed above in ¶¶ 4 and 6 regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

m. *FTB 104058 thru 104080 and 104081 thru 104116*: These withheld documents are not currently discoverable and need not now be provided to Hyatt, pending further court review of the circumstances of their preparation. These are two memoranda generated by Anna Jovanovich *after* her employment with the FTB ended and while she was retained by the FTB as a consultant specifically for this litigation. The FTB is ordered to produce *in-camera* supporting documentation demonstrating how and when the documents were generated. In the event Ms. Jovanovich is used or retained as an expert by the FTB, these documents shall be immediately produced to Hyatt.

n. *FTB 05938 thru 05965*: These withheld documents are not discoverable and need not be provided to Hyatt. These are news items obtained via Lexis.

o. *Self appraisal reports and evaluations*: These documents were submitted to the Court for *in-camera* review on September 10, 1999. They consist of the

self-appraisal reports and evaluations of Sheila Cox, Carol Ford, Sheila Samana, Jahna Alverado, and Felix Sorriano. These documents are not discoverable and need not be provided to Hyatt as they do not contain any information relevant to the issues in this case.

10. Hyatt's counsel identified during the November 9, 1999 hearing additional Hyatt-specific documents not produced by the FTB nor listed on its log. These documents are ordered to be submitted for an *in-camera* review. These include the Shigemitsu Reply Memo, the Jovanovich e-mail referenced during her deposition, the Bob Dunn e-mail to Sheila Cox, the Carol Ford handwritten notes, if any, and the Sheila Cox time sheets, if any.

11. Certain documents listed on the FTB privilege log, but not submitted *in-camera*, are ordered to be submitted to the Court for an *in-camera* review. Specifically, these include the pictures and memo identified on the FTB's May 26, 1999 "First Supplemental" privilege log as FTB 05994 to 05996. In addition, the Bob Dunn e-mail the FTB referenced on page 34 of its Post-Hearing Memorandum relating to the memo and pictures is to be submitted *in-camera*.

12. All documents, including redacted portions of documents, ordered by the Court during the November 9, 1999 hearing to be produced to Hyatt must be produced by the FTB to Hyatt by November 30, 1999.

13. All documents ordered by the Court during the November 9, 1999 hearing to be submitted *in-camera* to the Court must be submitted by the FTB to the Court by November 30, 1999. Counsel for Hyatt must be served with a privilege log from the FTB listing all documents

being submitted *in-camera*. Any prior *in-camera* submissions by the FTB, including but not limited its submission on September 10, 1999 for which a log was not provided to Hyatt's counsel, must be served on Hyatt's counsel by November 30, 1999.

14. The Discovery Commissioner heard additional oral argument in regard to the issue of whether to sanction the FTB for its failure and refusal to produce Anna Jovanovich for deposition or provide her last know address. The Discovery Commissioner denied Hyatt's request for costs for having to bring the Motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address.

DATED this 7th day of ~~November~~ December, 1999.

/s/ Thomas W. Biggar
DISCOVERY COMMISSIONER

Submitted by:

HUTCHISON & STEFFEN

/s/ Mark A. Hutchison
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Approved as to form:

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_____
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FTB

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

___ Mailed to Plaintiff/Defendant on the ___ day of ___, 1999 at the following address:

James W. Bradshaw, Esq.
McDonald Carano Wilson
McCune Bergin Frankovich & Hicks
241 Ridge Street, 4th Floor
Reno, Nevada 89508
Attorney for Defendant

[BOTH]

✓ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 7th day of December, 1999.

SHIRLEY R. PARRAGUIRRE

By: /s/ Mary Daigle
MARY DAIGLE
Deputy Clerk

Case Name: *Hyatt v. Franchise Tax Board*

Case Number: A382999

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner, and,

_____ The parties having waived the right to object thereto,

_____ No timely objections having been filed thereto,

✓[pw] Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

__/__ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 1999.

Dated this 21st day of December, 1999.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, VS. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	**CERTIFIED COPY** NO. A382999

VOLUME 1

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

TUESDAY, JANUARY 11, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[10] BY MR. BOURKE:

Q. What was it that caused you to decide not to be a friend with her anymore?

A. As I stated then and now, it's philosophical and spiritual differences.

Q. Did any of those differences relate to racism?

A. Yes.

Q. Could you tell me what you have in mind about Sheila Cox being a racist?

A. It would be my opinion that Sheila Cox is a racist.

Q. Did Sheila Cox ever talk to you relating to the Gil Hyatt case and say anything that could be regarded as racist?

A. I believe so, yes.

Q. And what did Sheila Cox say?

A. Sheila Cox said, "I'm going to get that Jew bastard."

Q. Did she say anything about Grace Jeng?

A. Yes.

Q. What did she say?

A. I don't feel right. She said – she would refer to Asian people as gooks and Grace Jeng also.

[11] Q. Now, did Ms. Cox ever tell you what Ms. Jeng's relationship with Gil Hyatt was?

A. Yes.

Q. What did she say?

A. She said that Grace was Gil's girlfriend.

Q. Did she refer to her as a gook girlfriend or an Asian girlfriend?

MR. WILSON: Objection, the question is leading.

BY MR. BOURKE:

Q. In what way would she refer to Grace Jeng?

A. Well, in reference that Grace was part of the whole tax evasion of Gil Hyatt, that was his girlfriend, she's this Asian lady, you know, she's this – then she started auditing her and . . .

Q. Did you regard what she said about Mr. Hyatt being Jewish as a slur?

A. Well, a racial epithet, you know, to call someone a Jew bastard.

* * *

[22] Q. And during that time period did she have other close friends at the FTB?

A. Maybe.

Q. But would you think that based on your knowledge of her, you were the closest friend she had at that period of time?

A. I believe so, yes.

Q. During that time period how often would you see Sheila Cox?

A. One period of time we – like the apex of our friendship we were going to school together at night and so Monday and Tuesday night it would be from, you know, after work, like 4:00 o'clock till 10:00 o'clock and then on Wednesday she had a third class and she'd stay in town at my house. So I saw her a lot and then we'd hang out sometimes on the weekends.

Q. You'd hang out meaning you would go out to dinner and things like that?

A. Stuff with my daughter, we'd sew pillows or, you know, make stuff.

Q. Now, during the time that you were friends with Gil – I'm sorry, with Sheila Cox, did she talk to you about the Gil Hyatt work that she was doing?

[23] A. Yes, she did.

Q. And did she tell you the details of the work she was doing?

A. Yes, she did.

Q. And at that time did you have any official role in the audit?

A. No, I didn't.

Q. Did she tell you about any interviews with Mr. Hyatt's relatives?

A. Yes, she did.

Q. What did she tell you about those?

A. That she got affidavits from Gil Hyatt's ex-wife and daughter and maybe somebody else in San Diego or something.

Q. Could that other person have been his brother?

A. A brother, yeah.

Q. And did she tell you about their attitude towards him?

A. They – yes.

Q. What did she say?

A. That they hated him.

Q. Did she tell you why they hated him?

A. Yeah.

Q. What did she say?

[24] A. That he was a bad man. They hated him.

Q. And was that her attitude towards him?

A. I believe it was.

Q. Did she say anything about investigating his La Palma, California former house?

A. Yes, she did.

Q. What did she tell you?

A. She said that she investigated the former La Palma house.

Q. Did she say how she did that?

A. How? How? Like what how?

Q. Well, did she say that she had gone there personally?

A. Oh, yes, she said she had gone there personally.

Q. How many times did she say she went there?

A. I don't recall.

Q. Do you recall whether she said she had seen any neighbors?

A. Yes.

Q. Did she describe those neighbors for you?

A. Yes.

[25] Q. What did she say?

A. She said that the neighborhood in a cul-de-sac was like on lookout and there was one guy in particular who had one arm who was like the lookout guy and it was really creepy.

Q. When she says on the lookout what did you understand her to mean?

A. The lookout for FTB residency auditors.

Q. Did she say how she knew that they were on the lookout for FTB?

A. No, she didn't.

Q. Did she say how old this one-armed man was?

A. I believe he was described as an old one-armed man.

Q. Did she say that his arm was cut off at the elbow or at the mid arm or –

A. One armed, that's it.

Q. Did she have any other names or words she used to describe the neighbors or associates of Gil Hyatt?

A. She told me it was a cast of ghouls looking out for – like on lookout for State auditors.

* * *

[42] Q. How did it happen that you went to visit Mr. Hyatt's house and his apartment?

A. Sheila said that she wanted to.

Q. Who –

A. And she was driving.

* * *

[51] Q. Ms. Les, could you tell me how long, approximately, it was that you and Ms. Cox took to visit Gil Hyatt's house in Las Vegas in November 1995?

A. It seems like two hours and 45 minutes.

Q. Now, how long did you take to visit the apartment complex of Mr. Hyatt?

A. Well, that's why it seems so long because we couldn't find that Pecos Street, I remember that clearly and distinctly and –

Q. So was the two hours and 45 minutes including both locations or was that just the house?

A. I think it was both locations.

Q. So you made a deliberate effort to find the Pecos location of the apartment complex. It wasn't just your driving by and happened to see gee, whiz, there is Gil Hyatt's apartment complex?

A. Sheila made a deliberate effort to find the apartment complex.

Q. Did she talk to you during this two hours and 45 minutes about why she wanted to see these places?

A. Yes, she did.

Q. What did she say?

[52] A. She said she wanted to see his house because at the end of the audit the taxpayer claimed he had built a berm on his house and she wanted to see the berm and she wanted to get some photographs or see the Wagon Trails again because I think she mentioned that she had been there before and that's what it was.

Q. Did she say why she wanted to take photographs?

A. I don't recall.

Q. Did she say what a berm was?

A. I think we looked up berm in the dictionary because we didn't know what berm was.

Q. Well, I'll be happy to get one from the shelves here but if you recall, what is your recollection of the definition of what a berm is?

A. A hillside to – yeah.

Q. Now, on Mr. Hyatt's house is there a small hill in the front of the house coming up from the road?

A. It appeared there was a berm.

Q. Now, did you take some photographs?

A. I didn't take any photographs. Sheila took photographs.

* * *

[59] Q. Do you know how many times Sheila Cox went by this celebrity's house?

A. I know of at least three times.

Q. So this was a house in Beverly Hills?

A. This is a house in Beverly Hills.

Q. Did you talk to Sheila Cox about her going three times to this celebrity's house?

A. Talk to her?

Q. Yes.

A. Like what?

Q. Was she proud of it what she was doing?

A. I believe she was proud of it, yes.

Q. Why was she proud of it, did she tell you anything? What did she tell you about it?

A. I think she regarded herself as, you know, some kind of sleuth, you know, residency sleuth and that, you know, she was doing the job and so she was a little braggadocio with it.

Q. Did she brag about any of her other cases?

A. Yes.

Q. Did she brag about the Gil Hyatt [60] audit?

A. Yes, she did.

Q. What did she say about the Gil Hyatt audit?

A. She did a really great job.

Q. Did she tell you – did she brag about her Gil Hyatt audit not only with you in private but also in front of other auditors?

A. I think to a lesser extent.

Q. Did she talk about the Gil Hyatt audit in the residency meetings that would be held periodically?

MR. MOSS: This is about Gil Hyatt you're asking about?

MR. BOURKE: Yes.

MR. MOSS: You should answer the question.

THE WITNESS: I'm sorry, the question again?

BY MR. BOURKE:

Q. Did she talk about the Gil Hyatt audit in the residency meetings that would be held periodically?

A. Yes, she did.

* * *

[61] Q. And how many occasions do you recall Sheila Cox mentioning the Gil Hyatt audit?

A. Well, it's hard to discern because I was her friend and she talked about it constantly and so with me, with other people –

MR. MOSS: I think he's referring to at these meetings.

BY MR. BOURKE:

Q. At the meetings.

A. Oh, at the meetings? She'd talk about one aspect of the case and that was like her case du jur, you know, she – seemed like year after year she was talking about the Gil Hyatt audit, seemed like.

* * *

[62] MR. BOURKE: We don't need to argue it so what I'm going to do is ask the court reporter to reread the question and we'll get it again maybe without the word "seems like." Could you reread the question?

(The record was read.)

MR. MOSS: I –

THE WITNESS: Often.

MR. MOSS: I asked a clarifying question about at these meetings.

MR. BOURKE: Right.

MR. MOSS: So at the meetings, these RAIN meetings how often at the RAIN meetings?

THE WITNESS: I believe if she was speaking at the monthly or biweekly RAIN meetings she was speaking about the Gil Hyatt audit.

BY MR. BOURKE:

Q. Did you get the impression that the Gil Hyatt audit was a big part of her case load?

A. More than an impression. I knew that [63] it was a big part of her case load.

Q. And how did you know that?

A. She told me and I could ascertain that.

Q. Did you ever get the impression or the sense during your audits that sometimes an auditor would get fixated on a particular audit?

A. Absolutely.

Q. And did that happen to Sheila Cox?

A. Sheila also, yes.

Q. And on what case did Sheila Cox get fixated?

A. I believe the Gil Hyatt case she was obsessed with.

Q. And when you say obsessed what do you mean?

A. Talk about incessantly, inability to let go even after it was closed to the point where she created a real fiction in her head about it, in my opinion.

MR. WILSON: Objection, opinion testimony.

BY MR. BOURKE:

Q. Have you seen other auditors get obsessed with their cases?

A. I believe so, yes.

* * *

[69] Q. Was it your understanding that visiting a taxpayer house for curiosity was forbidden by privacy regulations of the FTB?

A. I don't know about that, that it was forbidden by privacy regulations per se.

Q. Was it forbidden by the FTB rules and regulations?

A. As far as my understanding, it wasn't permissible.

Q. You talked about Sheila Cox being obsessed with the Gil Hyatt case. Do you recall whether or not Sheila Cox ever had a case as big as the Gil Hyatt case?

A. I do recall that she didn't.

Q. And did she tell you that it was the biggest case she ever had?

A. Yes she did.

Q. Did she tell you how big the Gil Hyatt case ranked in terms of other cases at the Franchise Tax Board residency unit?

A. I believe we had a conversation where she speculated, you know, just based on polling other auditors.

[70] Q. What did she think based on her poll?

A. That it had the largest tax potential, one of the largest tax potentials in the unit at that time.

Q. Did she say it had one of the largest or was the largest?

A. I think she told me that it was the largest at that time.

* * *

[101] Q. Now, with respect to your career with 300 cases and only two fraud cases, is that unusually low for the FTB or is that about right?

A. I'd say it's unusually high.

Q. So the FTB issues fraud penalties very extremely rarely?

A. From what I saw in my ten years, almost ten years, yes.

* * *

[113] Q. Now, when you read the materials Sheila Cox gave you on Gil Hyatt, included in the narrative was a fraud penalty question, correct?

A. Yes.

Q. Did you give her any comments about the fraud penalty case that Sheila Cox was building?

A. Yes, I did.

Q. What did you tell her?

A. I told her that it didn't look like fraud to me and that I felt that it would be inappropriate to send a letter like that to the taxpayer and that she needed to meet with the taxpayer and there she could glean out whether or not he was perpetrating a fraud.

Q. Do you know whether or not she ever met with the taxpayer?

A. To my knowledge I knew that she didn't.

Q. Did you ever find out whether or not she ever met with Grace Jeng?

A. I can't recall.

Q. Do you recall whether or not she ever met with Gil's relatives that were friendly to him?

A. This I – oh, friendly relatives?

Q. Friendly.

[114] A. I don't recall that she met with friendly relatives.

Q. Do you recall that she met with unfriendly relatives?

A. This I recall.

Q. Do you recall whether she ever tried to interview the one-armed man that was a neighbor at the house?

A. I don't recall that she ever tried to interview him.

* * *

[168] Q. Did she ever tell you about how many information requests she was sending out and what she was observing about Mr. Hyatt?

A. She talked about it, yeah.

Q. What did she tell you?

A. That she was bombarding him with information document requests and as I said before, you know, she did talk incessantly about the audit.

Q. You had quite a bit of experience, maybe 60 or more residency audits and a total of 300 audits. Did you send out third-party information demands on a regular basis?

A. No.

Q. Did Sheila Cox?

A. My understanding, yes.

MR. WILSON: Objection, hearsay. I move it be stricken.

* * *

[171] Q. With respect to the narrative that you read on the Gil Hyatt case that Sheila Cox prepared, was it your impression that she was fabricating a stronger case than existed?

MR. WILSON: Objection, the question leads. Also may call for an assumption.

MR. BOURKE: Let me rephrase the question.

Q. When you read the narrative did you get any sense or form an opinion about the strength of the case?

A. When I read the closing letter and had been listening to Sheila talk about the case, I believe she created an entire fiction about the taxpayer.

Q. And why do you say that?

A. I believe – what do you mean why?

Q. What do you base – what did you base your conclusion about that she had created an entire fiction?

MR. WILSON: Object to the question. Go ahead [172] and answer if you can.

MR. BOURKE: Let me rephrase it.

Q. You came to a judgment based upon all your discussions with her and having read the narrative, or the closing letter, that she had come up with an entire fiction about Gil Hyatt, right?

A. Yes.

Q. What is it that led you to that belief?

MR. WILSON: Same objection.

THE WITNESS: It was a process. Over a period of time I saw her uncertain about the case. I saw her rack up a lot of hours on the case and I saw her try to get cosigners, her colleagues, on to the case, which wasn't going too well until she started flavoring it with details about one-armed men and making the taxpayer seem like a vial [sic] character, and it was over a period of time where this was done and then when I finally saw this, the proposed assessment, I thought she had created a fiction about this guy that – and this is how she got legal to buy into it.

* * *

[176] Q. Now let me ask about a fact and what you heard. Did you hear Sheila Cox say things that were – that seemed to be designed to get cosigners on her audit work on the Hyatt case?

A. As I recall, yes.

Q. And what is it that you recall her saying, to the best of your knowledge? You don't have to give me exact words, but the gist of what she was doing.

A. Well, she told the story about the one-armed guy. She talked about the secret girlfriend staying at the house on guard, too. She talked about like the cart before the horse, that this guy is a tax evader. He set up this whole thing in Las Vegas.

Q. That's how she would refer to Gil Hyatt?

A. Yeah. In the meetings I don't recall her saying Gil Hyatt.

Q. Did she refer to him as an inventor?

A. Yes.

* * *

[181] Q. What relevance does having a berm have to do with the audit? Why did she care, if you know?

A. Because that's what the taxpayer claimed.

Q. Because the taxpayer claimed that there was a berm in front of his house?

A. Yes.

Q. And so she was claiming that the taxpayer had lied or misrepresented something about the facts?

A. That was my understanding.

Q. And your observations corroborated, in your opinion, what the taxpayer had said?

* * *

Q. Now, did Sheila Cox, when she talked about the inventor in the residency meetings over the course of the years that she was handling the Hyatt audit, did she refer to him as someone claiming a Las Vegas residency?

[182] A. I think it was California nonresident.

Q. I see. Did she identify him as having anything to do with Las Vegas?

A. I don't think so.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

CERTIFIED COPY

GILBERT P. HYATT,
Plaintiff,
vs.
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,
Defendants.

NO. A382999

VOLUME 2

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

WEDNESDAY, JANUARY 12, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[226] A. I went to tell Steve Illia, who was outside with Anna Jovanovich, you got to come in here and see Doug Dick.

Q. And why did you want him to come in and see Doug Dick?

A. I considered it a very wild presentation.

Q. Did you tell that to Steve Illia?

A. I did.

Q. And what did you tell him?

A. I said, "You got to come in here and see Doug Dick, this presentation, it's wild."

Q. What did Doug Dick say before that three minutes that you ran out, what had he been saying to the auditors of the FTB?

A. He was like in high glee doing this presentation on how to close an audit and he had these big poker chips about, you know, like with penalty or T and E, travel and entertainment expenses and just how you can kind of negotiate by shuffling the chips and putting them behind your back, you know, and then popping them out once you get this area, and it was really kind of like this Vaudeville routine on audit, you know, and I just thought it was really weird and so I knew that Steve wasn't in the [227] room and I wanted him to come in and see it.

Q. Now, could you describe for us that big poker chip that you mentioned? How big was it? Could you show the camera?

A. It was like bigger than a poker chip, you know.

Q. So was it made out of cardboard or something like that?

A. Something.

Q. And was it black?

A. Yeah, I think that the penalty one was black or they were all black. They were like negotiating chips that

you were going to use with the taxpayer to close audits, to settle audits.

Q. And the one that was most relevant for residency cases was which one? I mean travel and entertainment expenses are not a big item in residency cases, are they?

A. No.

Q. So which was the one that was applicable to residency cases?

A. Well, there was no residency chip. It's kind of an all or nothing situation.

Q. What I meant was isn't the penalty chip the one that was relevant for residency because [228] that's the main one you'd use?

MR. WILSON: Objection, the question leads and is suggestive. You may answer.

THE WITNESS: Well, I will say it was a residency conference.

BY MR. BOURKE:

Q. I see, okay. Did he talk about giving up the penalty at all in return for anything else?

A. As I recall, the penalty chip was used as a persuasive tool to I think get the taxpayer to agree or succumb to the adjustment.

Q. So whatever it was that the auditor really wanted to achieve, the auditor would achieve his goal on taxes by giving up a penalty chip?

MR. WILSON: Objection, the question leads.

THE WITNESS: I think that's what it was.

* * *

[245] Q. Is that ever thrown up to an auditor that his or her no change percentage is too big, as a way of criticizing the auditor?

A. Not in terms of no change percentage, but too many no changes.

Q. Too many no changes. Did you ever talk about whether – with Sheila Cox did you ever talk about with Sheila Cox whether the Gil Hyatt audit should be a no change?

A. Yes, I did.

Q. And what did you say to her and what did she say to you?

A. Well, we discussed for weeks about reclassifying the income because as I recall in the Gil Hyatt case it's intangible income, which treatment differs significantly from ordinary income, and so you know, we explored those possibilities, and there was nobody that I ever knew of and only one case in case law that we ever really saw, and that was a partnership, where you could – I mean I don't want to get all technical with this, but you could say that intangible income had acquired a situs in, you know, California and therefore should be taxed in [246] California, but it was really hard, the requirements for acquiring a situs. So other than reclassifying the intangible income, the royalty or patent income as ordinary income, you know, it was really hard. So she was getting like Allen Shigemitsu to help her see if there was some way to reclass that money and for weeks, you know, we would

talk about that, you know. It seemed rather – the possibility of reclass was kind of bleak, you know.

Q. Did you gather from what she was telling you that she was searching for ways to tax Mr. Hyatt?

A. Yes.

* * *

[253] Q. Now, did she ever call Mr. Hyatt any names?

A. Yes.

Q. What did she call him?

A. She did call Gil Hyatt, just as we talked about yesterday in the opening deposition, was Jew bastard, after she received his synagogue from Las Vegas support letter.

Q. Now, you said that she called one of the neighbors a one-armed man and another person saying that Mr. Hyatt was surrounded by ghouls. Did she ever have any other insult names that she used on Mr. Hyatt?

A. She called him a cheap bastard.

Q. What did she say about him being cheap?

[254] A. How cheap it was – this was in reference to Grace Jeng's tax returns. I think that she received – Grace Jeng received salary from Gil and –

MR. MOSS: Wait a second. Wait a second. Could she talk about Grace Jeng's –

MR. BOURKE: Grace Jeng is willing to waive any discussion about her tax situation that this witness learned at the FTB.

* * *

BY MR. BOURKE:

Q. Grace Jeng and Gil Hyatt, you can talk about both.

MR. MOSS: Sorry.

THE WITNESS: Sorry. Thanks. Yeah, that somehow the salary that Grace Jeng was being paid by Gil Hyatt, you know, for a millionaire, he was a cheap bastard.

BY MR. BOURKE:

Q. Did she ever call him a freak?

MR. WILSON: Objection, the question leads and suggests.

THE WITNESS: She did.

[255] BY MR. BOURKE:

Q. Was she afraid of him yelling at her or raising his voice?

A. I don't know what her fear stemmed from.

Q. Did she say why she felt he was a freak?

A. Yes.

Q. What did she say?

A. Sheila disclosed to me how Gil Hyatt's son was murdered in Huntington Beach and she thought that that made him a freak.

Q. Because some member of his family was a victim of a crime?

A. Because a member of his family was murdered and it was unsolved.

Q. Did she tell you anything about the murder of his son being a sensitive matter within the family and did you regard it as a sensitive matter?

A. I certainly did.

MR. WILSON: I object, the question leads. Go ahead.

THE WITNESS: It was a sensitive matter.

* * *

[263] Q. All right, during the 15 minutes did you get out of the car?

A. Yes.

Q. Did Sheila Cox get out of the car?

A. Yes.

Q. So was it just a drive-by?

A. No.

Q. Sheila Cox has testified that it was a drive-by. Does that refresh your memory that maybe it was just a drive-by?

A. It wasn't just a drive-by, although we drove by.

Q. You drove by but also stopped for 15 minutes?

A. Right.

Q. Did both of you get out of the car?

A. Yes.

Q. Now, with respect to Wagon Trails during that same visit in November 1995 did you and Sheila Cox drive to Wagon Trails?

A. Yes, we did.

Q. Did you stop the car?

[264] A. I believe so.

Q. Did you take a photograph?

A. Yes.

Q. And what was that photograph about?

A. Sheila took a photograph.

Q. Did she take two photographs?

A. I believe she took two photographs with my camera, yes.

Q. Now, at the house in Las Vegas, Gil Hyatt's house on Tara, did Sheila Cox take any photographs?

A. Yes.

Q. And what did she take a photograph of?

A. She took a photograph of me by Gil's house.

Q. Did she take any other photographs?

A. I think she took like three or four photographs at Tara.

Q. Did you take any photographs?

A. At Tara?

Q. Yes.

A. I think not.

Q. Did you take any photographs at Wagon Trails?

A. No.

* * *

[268] Q. Could you tell me what you and Sheila Cox did during the time you were at the Gil Hyatt house in November 1995 during that entire time up to 15 minutes?

A. Okay, as I recall we went to that Pecos Wagon Trails first and it took us so long, I think we talked about two hours and 45 minutes doing this whole tour of Gil Hyatt addresses on that map that was an exhibit, and we couldn't find the Pecos because there is like a lot of Pecos or something [269] like that and we were driving and driving and that took a long time, maybe an hour, and then as I recall, the Tara house was on the other side of town and we were driving, driving, driving. At this point I was carsick and I was like sitting on the curb and she was up at his house. I got out of the car and like plopped on the curb. I was sick, and she was at his window, at Gil Hyatt's window or at the house's window and then she went to the mailbox. She was looking through it. I believe it was trash day. She lifted up the trash lid and then I got up and I ran across the street to the Gil Hyatt side of the street. I was like come on, come on, let's get out of here, come on. She

came back to the car. She got my camera. She took some pictures. I think I sat down on the curb one more time and we got in and we left.

Q. Did you and she then talk about what had just gone on?

A. We talked about the berm.

Q. What did you say about the berm?

A. She said, "It doesn't look like a berm." I said, "That looks like a berm," and we drove away. We didn't really talk about that adventure.

* * *

[275] Q. Did you ever put the Hyatt house photographs into any audit file at the FTB?

A. No.

Q. Did you have any need to have a photograph of the Wagon Trails Apartments that Gil Hyatt used to live in?

A. I had no need for that photograph.

Q. Did Sheila Cox ever ask you for that photograph to be printed up and given to her?

A. No.

Q. Did you ever put that Wagon Trails photograph in any FTB file?

A. No.

Q. Was your visit to the Tara residence because you happened to be in the neighborhood and just decided to do a drive-by?

A. I believe the visit was a preconceived visit from Sheila planning to visit these various locations of Gil Hyatt's.

Q. Well, Sheila Cox testified that you and she were in the neighborhood and you just did a quick little drive-by without stopping. Is that untrue?

A. That's untrue.

* * *

[329] Q. Are you aware of any case where the Franchise Tax Board has proved that some Nevada person was not really a Nevada person and was just trying to evade California taxes?

A. No, I'm not aware of that.

Q. Does the Franchise Tax Board, during the time you were there, have a practice of researching wealthy Nevada persons?

A. I'm aware that that was a discovery project.

Q. And what is a discovery project?

A. You know, kind of like a auditor's brainstorm idea on how to find unreported income or new ways of finding nonresident taxpayers that should be paying tax in the state of California.

Q. And who gave this term discovery project to it, is that from upper management?

[330] A. I believe it was, yes.

Q. Is that from Steve Illia or even before him?

A. For some reason I attribute it to this Laura Buck supervisor out of San Bernardino in residency.

MR. WILSON: Bucks?

THE WITNESS: Buck.

BY MR. BOURKE:

Q. And how many discovery projects are you aware of that related to Nevada persons?

A. I can think of I think three offhand.

* * *

[347] Q. Did Sheila talk to you, in her conversations about the Hyatt case, about Gil Hyatt being a guy that was concerned about privacy?

A. She said that Gil Hyatt said he was concerned about privacy.

Q. Did she say anything about Gil Hyatt trying to keep his address secret or confidential?

A. Yes.

Q. Did she say anything about Gil Hyatt trying to keep his financial information confidential?

A. I don't know.

* * *

[389] Q. Did she talk about his house in a disparaging way, his former residence in California, did she say it was a crummy house or anything like that?

A. Yes. She said it was a dump.

Q. Did you ever ask her what she meant by saying it was a dump?

A. No.

Q. When she referred to Mr. Hyatt's personal assistant Grace Jeng as a gook girlfriend, was that in the presence of other auditors or just yourself?

A. She said it in front of me.

Q. So you don't recall her saying that at a residency audit meeting?

A. No.

* * *

[405] BY MR. BOURKE:

Q. All right, I take it that one of – now, could you tell me is the reason – did you have a reason for the statement you've made earlier in the deposition that you believe that this was trash day that you were visiting?

A. I recall trash cans and Sheila in the trash can.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

CERTIFIED COPY

GILBERT P. HYATT, Plaintiff, VS. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	NO. A382999

VOLUME 4

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

THURSDAY, JANUARY 20, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[615] EXAMINATION

BY MR. BOURKE:

Q. Ms. Les, I'd like to refer to a topic we started on and that has to do with the assessments of penalties at the FTB. Do you recall that during your career you observed that the assessment of fraud penalties was very rare at the FTB?

A. Yes.

Q. Now, did you also observe that this is true not only in your own individual career but also for other auditors?

A. Yes.

* * *

[677] Q. Now, you a few lines later here at page 25 basically said you that you wanted – on line 25 you said you wanted Steve Illia to come and see Doug Dick because you considered it a very wild presentation. And the next page says that you told Steve Illia you've got to come in here and see Doug Dick. This presentation is wild. And what I'd like you to explain, please, is what did you consider wild about his presentation?

A. Well, it was kind of like a secret, you know, about the close of an audit, you know, and what an auditor might say to a taxpayer, you know. I mean I often wondered and I asked, you know, other auditors like, you know, how do you do your closing conferences? Because I had one for every single one of my audits, I'm wondering, you know, what they did. And you know, you hold those cards close to your vest as an auditor, right, with that enormous risk because it's all on you. And you know, you wonder, you speculate what your colleagues are doing, and there are certain things you didn't talk about at Franchise Tax Board. You didn't talk about the cost benefit ratio. You didn't talk about, you know, how many cases you closed or the number of adjustments or [678] really what it was like at the end of an audit, what you used to get the taxpayer to agree to the facts, to succumb to the adjustment, you know.

MR. MOSS: Why did that make his presentation wild?

THE WITNESS: He was just saying it, he was like up front with like this whole thing; look, you use these negotiation chips. It was like what, are you giving us the green light to take a penalty chip and hold it over the taxpayer's head? I'd never heard that verbalized. I'd certainly never seen it in a routine and I just considered that wild.

* * *

[684] BY MR. BOURKE:

Q. Now, directing your attention again to the Doug Dick presentation, we are looking at an exhibit that we marked, I think it's 299, do you have that in front of you? Would you look at page 26 there?

A. Okay, yes.

Q. And lines 12 and 13 – well, 11, 12 and 13 you are saying that Mr. Dick was in high glee during this presentation on how to close an audit and he had these big poker chips about, you know, like with penalty or T and E, travel and entertainment expenses. Could you talk about what he said about a [685] poker chip and the penalty?

A. It was like and then this chip and it was a black chip and it said penalty. He goes and this chip that you've got behind your back, you say well, I don't know about – let's close the audit and like hesitating when to come in with that penalty chip. You know, like let's close it. Okay, do we have an agreement on the travel and entertainment expenses? And then through his presentation the chip would come back and forth, the black penalty one.

* * *

[687] you said, "As I recall, the penalty chip was used as a persuasive tool to I think get the taxpayer to agree or succumb to the adjustment." What did you mean when you said "get the taxpayer to agree or succumb to the adjustment"?

A. Well, two different things, they agree or succumb. I mean taxpayers will cry uncle if you twist their arm hard enough.

* * *

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No.: A382999 Dept. No.: XVIII Docket No.: R **AFFIDAVIT OF SHEILA COX**

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

SHEILA COX being first duly sworn upon oath deposes and says as follows:

1. I am a certified public accountant licensed in the State of California and employed by the California Franchise Tax Board (the "FTB") as an Associate Tax Auditor.

2. I was hired by the FTB in June 1991 as a Tax Auditor, and served in that capacity until July 1995, when I became an Associate Tax Auditor. Between June 1996 and December 1996, I served as a Special Investigator. From December 1996, to the present, I have worked in the capacity of an Associate Tax Auditor. I make this affidavit in my official capacity and no other. This Affidavit is made of my own personal knowledge and, if called as a witness, I would competently testify thereto.

3. In November 1994, the FTB assigned me to work on the residency audit of Gilbert P. Hyatt's 1991 California Income Tax Return, which had been in progress since June 1993. The first thing that I did was thoroughly review and analyze the audit records and workpapers, which I was charged to maintain and control.

4. The Hyatt audit file contains Mr. Hyatt's California Nonresident Part-Year Income Tax Return for 1991. A true and correct copy of Mr. Hyatt's 1991 return is attached as Exhibit 1.

5. The Hyatt audit file indicates that to initiate the FTB's 1991 audit of Mr. Hyatt, the FTB sent two notice Letters (FTB form 4891-39) to Hyatt's claimed Nevada address on June 17, 1993 and July 1, 1993. True and correct copies of the notice letters are attached hereto as Exhibit 2.

6. True and correct copies of the Powers of Attorney from Mr. Hyatt that are in the audit file are attached as Exhibit 3.

7. The Hyatt audit file indicates that the FTB mailed a cover letter and one of its standard forms ("FTB 3805F"), requesting basic information about residence status, to Hyatt's Las Vegas accountant, Michael W. Kern on July 15, 1993. A true and correct copy of this letter from the audit file is attached as Exhibit 4.

8. A true and correct copy of Mr. Hyatt's August 4, 1993 response to the FTB's July 15, 1993 letter is attached as Exhibit 5.

9. During the 1991 Hyatt audit, I learned that Mr. Hyatt had a California doctor's appointment on September 26, 1991, and told this to Hyatt's accountant. A true and correct copy of the letter from the doctor that I received conveying this information is attached as Exhibit 6; a true and correct copy of my letter conveying this information to Mr. Hyatt's accountant is attached as Exhibit 7. In response, Mr. Hyatt changed his claimed move date from September 25, 1991 to September 26, 1991, and alleged that on September 26, 1991, after he visited his doctor in California, he left for Nevada to begin establishing his residence and business there. A true and correct copy of the September 22, 1995 letter changing Mr. Hyatt's claimed move date is attached as Exhibit 8.

10. Despite my repeated requests and the promise of Mr. Hyatt's accountant to do so, Mr. Hyatt failed to provide any substantiation and corroborative documentation that he either moved his personal effects from his La Palma, California home to Nevada or acquired furnishings for his alleged Nevada residence. True and correct copies of my multiple request letters on this subject are attached as Exhibit 9. A true and correct copy of the letter from Mr.

Hyatt's accountant promising to provide such information is attached as Exhibit 10.

11. During the audit, Mr. Hyatt ultimately claimed that he had no moving receipts and that he moved himself using his family's trailer, providing a Nevada motor vehicle registration statement dated June 1992, for a trailer issued in the name of his son. A true and correct copy of the February 22, 1995 letter from Mr. Hyatt's lawyer conveying this information is attached as Exhibit 11.

12. Credit card statements that Mr. Hyatt's representatives provided me during the 1991 Hyatt audit showed evidence of dining charges in California on several of Hyatt's credit cards from September 1991 through March 1992, including a charge at a California restaurant on October 2, 1991, and Nevada dining charges on only one day from January 2, 1991 through March 16, 1992. Attached as Exhibit 12 is a list of dining charges compiled from these credit card statements.

13. I had to send five separate request letters to Mr. Hyatt's accountant to get the credit card statements that showed the dining charges described in the previous paragraph. True and correct copies of my request letters are attached as Exhibit 13.

14. The Hyatt audit file contains a September 8, 1993 letter from Mr. Hyatt's accountant enclosing a lease agreement for a Las Vegas apartment that began on October 20, 1991. A true and correct copy of this letter from the audit file is attached as Exhibit 14.

15. I asked Mr. Hyatt's attorney in writing on two occasions where Hyatt stayed during the time between the

earliest date he claimed he changed residency (September 25, 1991) and the start date of his rental agreement (October 20, 1991). True and correct copies of my request letters dated August 31, 1995 and September 26, 1995 are attached as Exhibit 15.

16. During the Hyatt audits, I never received any explanation or documentation from Mr. Hyatt's accountant or attorney of where Mr. Hyatt stayed in Nevada between September 25, 1991 and October 20, 1991.

17. In the September 22, 1995 letter from Mr. Hyatt's attorney that is attached as Exhibit 8, Mr. Hyatt's attorney informed me that Mr. Hyatt was in Washington, Texas, and New York from October 14, 1991 to October 22, 1991.

18. When I and another FTB auditor interviewed the manager of the Wagon Trails Apartment complex, the Las Vegas complex where Mr. Hyatt claimed to have rented an apartment, she informed us that the complex served many tenants receiving federal HUD subsidies. The apartment manager also informed us that she did not remember seeing Hyatt often, and that he paid the rent ahead of time with a post dated check. The manager showed us Hyatt's rental file, which contained one envelope that had Hyatt's Las Vegas post office box as a return address, but was postmarked from Long Beach, California. My narrative notes of the March 1995 Las Vegas, Nevada field visit that included this interview, attached as Exhibit 16, show that the postmark was dated December 8, 1991.

19. I could never verify Mr. Hyatt's claimed Nevada civic and social affiliations that began earlier than April 1992. My letters to the computer hobby group and Jewish temple addresses that Mr. Hyatt gave were returned as

undeliverable. True and correct copies of the returned envelopes are attached as Exhibit 17. Mr. Hyatt's accountant later told me that Mr. Hyatt provided the wrong temple in the initial response, and gave the name of another temple, but this second temple did not respond to my inquiry. The Nevada Development Authority that Hyatt identified in his response had no record of his membership. A true and correct copy of the response from the Nevada Development Authority stating this is attached as Exhibit 18. The Nevada Governor's office had no record of any contact with Mr. Hyatt. Exhibit 19 is a true and correct copy of the letter from the Nevada Governor's office stating this. The Nevada Senator's office did not respond to my inquiry.

20. The Nevada school tutoring program that Mr. Hyatt claimed to have assisted beginning in April 1992 could not verify his alleged volunteer activity. True and correct copies of my relevant telephone notes and school district letter stating this are attached as Exhibit 20.

21. The Hyatt audit file indicates that when the FTB asked for escrow documentation for the sale of Mr. Hyatt's California home, Mr. Hyatt provided copies of three non-notarized, unrecorded documents: a grant deed, a promissory note, and a trust deed. Exhibit 14. The audit file reflects that the FTB then asked the Recorder's Office in the appropriate California county for recorded documents concerning the property transfer, and that the Recorder's office provided what appeared to be the same grant deed, notarized, and recorded on June 16, 1993. True and correct copies of the FTB's request letter to the Recorder's Office and the recorded grant deed in the audit file are attached as Exhibits 21 and 22, respectively.

22. Excerpts from two licensing agreements between Mr. Hyatt and electronics companies in the Hyatt audit file that are dated after Hyatt's claimed move to Nevada list a California mailing address for Mr. Hyatt. True and correct copies of these licensing agreement excerpts in the audit file are attached as Exhibit 23.

23. In March 1995, I went to Las Vegas, Nevada to make a field visit on the 1991 Hyatt audit. I was accompanied by another FTB auditor who was visiting Las Vegas on her own cases, and who served as a witness to my work on the Hyatt audit during the field visit. The field visit took place over three consecutive business days. Only part of each day was spent working on the Hyatt audit.

24. My narrative notes of the March 1995 Las Vegas field visit, attached as Exhibit 16, accurately describe the actions that I and the other FTB auditor took on the Hyatt audit during the visit. I prepared these narrative notes the day after returning to California from the Las Vegas trip. They are included as a part of the FTB's audit file concerning Mr. Hyatt.

25. During the March 1995 field visit, when a contact with a Nevada citizen required it, I identified myself as a California Franchise Tax Board employee and showed my Franchise Tax Board identification card. A true and correct copy of my identification card is attached as Exhibit 24. If any person contacted requested information about the reason for the inquiry, I stated that it was regarding a tax matter. Neither I nor the auditor accompanying me revealed Mr. Hyatt's name during any such contact unless necessary and we never disclosed Mr. Hyatt's social security number or comparable specifics about Mr. Hyatt to anyone during the field visit.

26. During the end of November 1995, I accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases. During the trip, because the other auditor's case work was in the vicinity of Mr. Hyatt's claimed residence, I made a brief observation of it. I made no inquiries with other persons during this trip concerning the residency of Mr. Hyatt.

27. The FTB's audit file for Mr. Hyatt reflects that the Hyatt audit involved phone contacts with Nevada third parties between July 15, 1993 and September 27, 1995. Attached as Exhibit 25 is a schedule containing all of the notes of phone contacts with Nevada third parties during the audit that are contained in the Hyatt audit file.

28. The FTB's audit file reflects that the Hyatt audit involved mail contacts with Nevada third parties between July 15, 1993 and September 27, 1995. The audit file reflects that these mail contacts were either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB form.

29. The audit file reflects that the FTB's mail correspondence by letter alone involved twenty letters to fifteen Nevada recipients: the Department of Motor Vehicles (two letters), the Las Vegas Postmaster (three letters), five Clark County Government agencies (seven letters), Nevada Governor Robert Miller, Nevada Senator Richard Bryan, Dr. Steven Hall (Mr. Hyatt's dentist), University Medical Center, KB Plumbing, Mr. Pryor (a resident in Mr. Hyatt's claimed Las Vegas neighborhood), Mr. Eggers (another resident), and Allstate Sand and Gravel. True and correct copies of all of these letters from the Hyatt audit file are attached as Exhibit 26.

30. The audit file reflects that the FTB's mail correspondence by cover letter enclosing an FTB "Demand to Furnish Information" involved fifteen letters to twelve Nevada recipients, including: Temple Beth Am (two letters), the Sports Authority (two letters), Nevada Development Authority, Personal Computer Users Group, Bizmart, Sam's Club, Congregation Ner Tamid, Las Vegas Valley Water District, Silver State Disposal Service, Southwest Gas Corp., Las Vegas Sun (two letters) and the Wagon Trails Apartments. True and correct copies of all of this correspondence from the Hyatt audit file is attached as Exhibit 27.

31. 78% of the FTB's third party contacts in Nevada by mail or phone described above were to persons or entities that Mr. Hyatt identified on his initial response to the FTB's request for residency information.

32. Certain FTB correspondence from California to Mr. Hyatt or his representatives in Nevada that occurred during the Hyatt audits has previously been identified in this affidavit as Exhibits 2, 4, 7, 9, & 13. The remaining FTB correspondence from California that occurred during the Hyatt audits where a representative of Mr. Hyatt's in Nevada is the recipient is attached as Exhibit 28.

33. Attached as Exhibit 29 is a schedule containing all of the notes of phone contacts with Hyatt's Nevada accountant during the audit that are contained in the FTB's audit files for Mr. Hyatt.

34. I spent less than three business days physically in Nevada and nominal hours on phone and mail contacts from California to Nevada to verify Mr. Hyatt's claims as compared to the total 624 hours the FTB spent on the 1991 audit.

35. The audit file shows that the FTB contacted the Clark County Department of Election Records and was informed that on July 5, 1994, Mr. Hyatt filed a voter registration affidavit to change his claimed voter registration address to 5441 Sandpiper Lane, Las Vegas, Nevada 89102. A true and correct copy of the 1991 narrative report discussion of "Voter Registration" and record of this discussion is attached as Exhibit 30. I verified through a "Lexis" search that the above property was owned by Michael and La Dawn Kern, Mr. Hyatt's accountant, and that the Kerns had sold the property on October 27, 1994 and had purchased another property on June 3, 1994. A true and correct copy of the Lexis printout is attached as Exhibit 31.

36. All of the actions that I took involving Mr. Hyatt were for the purpose of determining whether Mr. Hyatt had established significant ties with Nevada and had severed significant ties with California at the time that he claimed.

37. I determined that Mr. Hyatt had not established significant ties with Nevada and had not severed significant ties with California during 1991.

38. I was assigned to work the residency audit of Mr. Hyatt for 1992 which was initiated based upon facts developed during the audit of 1991, which showed that Mr. Hyatt had not established significant ties to Nevada during 1991 and continued to have significant California ties beyond 1991. A true and correct copy of a letter dated January 19, 1996 to Eugene Cowan is attached as Exhibit 32.

I hereby affirm under penalty of perjury that the assertions of this Affidavit are true.

DATED this 21st day of January, 2000.

/s/ Sheila Cox
Sheila Cox

SUBSCRIBED and SWORN to before me
this 21st day of January, 2000.

/s/ Linda Richardson
Notary Public

[SEAL]
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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. A382999 Dept No. XVIII **AFFIDAVIT OF EUGENE G. COWAN IN OPPOSITION TO THE FTB'S MOTION FOR SUMMARY JUDGMENT** FILED UNDER SEAL BY STIPULATION AND ORDER DATED FEBRUARY 1, 1999

(Filed Mar. 22, 2000)

TABLE OF CONTENTS

		Page
I.	Background and expertise	1
II.	Initial representation of Gil Hyatt	1
III.	There was full cooperation with the FTB auditors	2
IV.	FTB false promises of confidentiality	3
	A. Agreements and assurances from FTB auditor Mark Shayer	3
	B. The FTB, through Mr. Shayer, agreed to keep Mr. Hyatt's Las Vegas address confidential	4
	C. Agreements and assurances from FTB auditor Felix Soriano	4
	D. Agreements and assurances from FTB auditor Sheila Cox	5
	E. Mr. Hyatt and I relied on the FTB representations of confidentiality	6
	F. The FTB reconfirmed Mr. Hyatt's desire for privacy and his desire to keep his Las Vegas address confidential	6
	G. Mr. Hyatt's frugal and unassuming lifestyle was explained to the FTB	7
	H. Mr. Hyatt's desire for privacy and desire to keep the address of his Las Vegas home confidential was reiterated to the FTB	8

I. In sum – The FTB was continually reminded of Mr. Hyatt's desire for privacy and confidentiality, and the FTB repeatedly promised to keep Mr. Hyatt's materials confidential 9

V. The FTB's standard for determination of residency and its application to Hyatt 9

VI. The FTB's proposed assessment for the 1991-tax-year and its public disclosure by the FTB 10

VII. Protest of 1991-tax-year assessment 11

VIII. FTB audit and assessment for the 1992-tax-year and the FTB's multi-million dollar error 12

IX. Receipt of 3,500 page audit file and discovery therein of the FTB's audit conduct 13

X. Settlement threats from the FTB's first protest officer..... 13

XI. Commencement of this case..... 15

XII. The Nevada litigation does not interfere with the protests..... 15

A. Continuation of the protest 15

B. Isolation of protest officer from the FTB litigation team..... 16

C. FTB recommencement of protest after Nevada court ruling 16

XIII. FTB failure to follow its own internal policy for processing the protest..... 17

XIV. FTB requests further information from Hyatt in the protest and finally sets hearing date for protest..... 19

XV. The FTB auditor issued a perjured subpoena to try and acquire information about Mr. Hyatt 19

AFFIDAVIT OF EUGENE G. COWAN

STATE OF CALIFORNIA §
§ ss.
COUNTY OF LOS ANGELES §

EUGENE G. COWAN, being first duly sworn, deposes and says:

I. Background and expertise.

1. I am a member of the California Bar and have been a practicing attorney for over 18 years. I am a Principal of the firm of Riordan & McKinzie, a professional corporation. I have been affiliated with Riordan & McKinzie for over 13 years, and have been a Principal of the firm since 1990. Specifically, I am a Principal in Riordan & McKinzie's Tax/Probate Department, and I practice in the area of taxation including real estate and other partnership syndication, income tax planning for individuals, business and tax exempt organizations and state and local income, property and sales tax matters. I frequently represent clients before the Internal Revenue Service and the Franchise Tax Board of California.

2. I graduated from University of California of San Diego in 1977 with a B.A. in Chemistry, and I received a M.A.T. in education from Northwestern University in 1978. I graduated from University of California, Berkeley School of Law (Boalt Hall) with a J.D. in 1981, and I

received an L.L.M. in taxation from New York University in 1983.

II. Initial representation of Gil Hyatt.

3. I first began representing Gil Hyatt in late 1991. At the time he retained me, Mr. Hyatt had moved to Nevada and sought my advice regarding tax planning and in regard to the preparation of both his 1991-tax-year California state income tax return (given his partial residency during 1991) and his 1991-tax-year federal income tax return.

4. I continued to provide Mr. Hyatt tax-planning advice on a periodic basis through mid-1993 when he was first notified by the FTB that it was auditing his 1991-tax-year California state income tax return. Thereafter, the scope of my representation of Mr. Hyatt increased to include representing Mr. Hyatt during the 1991 tax-year-audit. I subsequently represented Mr. Hyatt during the 1992-tax-year-audit. I currently represent him in regard to the long pending protests submitted by Mr. Hyatt in regard to the FTB's proposed assessment of taxes for each of the 1991 and 1992 tax-years. The FTB's audits, its proposed assessments and the protests are discussed in greater detail below.

III. There was full cooperation with the FTB auditors.

5. The 1991-tax-year audit ran from mid-1993 until early 1996, and the 1992-tax-year audit ran from late 1995 until late 1997. During the audits, I had frequent contact via telephone, written correspondence, and occasional in-person meetings with the three FTB auditors, Mark

Shayer, Felix Soriano, and Sheila Cox, who were successively assigned to the audits over the next three years. During this period, Mr. Hyatt – with my assistance and the assistance of his Nevada CPA Mike Kern – produced without objection the documents requested by the FTB auditors, all in a timely manner.

6. The production of documents and information to the FTB was enormous. Most of the 3,500 pages in the audit filed compiled by the FTB on Mr. Hyatt were documents produced by Mr. Hyatt.

7. At all times during the audits, Mr. Kern and I were cooperative and professional. To the contrary, I felt I developed an extremely good working relationship with each of the FTB auditors. At the outset of the audit, I had no reason to believe that the FTB would not act in a fair and reasonable manner. I therefore saw no reason to object to its seemingly never-ending demands for more and more information, nor to refuse to produce the information and documents requested – *so long as it agreed to keep the information and documents strictly confidential.*

IV. FTB false promises of confidentiality.

8. The productions of documents and information to the FTB were preceded by countless, and quite explicit, oral and written assurances from the FTB that the information Mr. Hyatt was submitting would be kept strictly confidential and not publicly disseminated. From the outset of the audits, I informed the FTB of Mr. Hyatt's need and desire to keep private and confidential the materials produced during the audits. The following is a chronology of the written and oral contacts that I have had with the FTB concerning Mr. Hyatt's desire for confidentiality and/or

privacy, and the FTB's agreements to keep Mr. Hyatt's materials confidential and private. It is based upon my recollection, correspondence with the FTB, and the audit files.

A. Agreements and assurances from FTB auditor Mark Shayer.

9. On September 13, 1993, I spoke with Mark Shayer, FTB auditor, regarding reviewing taxpayer documentation. I told him that Mr. Hyatt did not want his licensing agreements readily available to all FTB personnel. Mr. Shayer explained that FTB personnel was required to maintain the confidentiality of a taxpayer's records. *Mr. Shayer assured me that Mr. Hyatt's file would be maintained in a locked cabinet and that only the FTB personnel working on the case would have access to the file.* We set up an appointment for Mr. Shayer to review the file on September 23, 1993.

10. On September 29, 1993, Mr. Shayer came to my office to review the documents requested by the FTB, including the agreement between Mr. Hyatt and Philips. I told Mr. Shayer that because of the documents' confidential nature, I wanted him to make copies only of excerpts, as needed. I reiterated to Mr. Shayer the sensitive, confidential nature of the documentation. Mr. Shayer assured me that the confidentiality of the documents would be maintained.

B. The FTB, through Mr. Shayer, agreed to keep Mr. Hyatt's Las Vegas address confidential.

11. My November 1, 1993 letter[1] to Mr. Shayer responded to his October 18, 1993 letter[2] requesting information from Mr. Hyatt. In Mr. Shayer's October 18, 1993 letter, he asked for information regarding Mr. Hyatt's purchase of his home in Las Vegas. My November 1, 1993 letter noted, that in providing the escrow information, *the address of Mr. Hyatt's home had been deleted. This deletion was made on the basis of a previous discussion I had with Mr. Shayer regarding Mr. Hyatt's desire to keep his home address in Las Vegas private and confidential. Mr. Shayer agreed that the FTB would keep Mr. Hyatt's home address confidential* as all documents submitted by Mr. Hyatt to the FTB would be kept confidential.

C. Agreements and assurances from FTB auditor Felix Soriano.

12. On June 29, 1994, I spoke with Felix Soriano, the new FTB auditor, regarding furnishing additional contracts for his review. I told Mr. Soriano about the sensitive and confidential nature of Mr. Hyatt's contracts, and asked him to come to my office to review the contracts. He said that he would. We scheduled an appointment for July 5, 1994 (which was rescheduled to July 11, 1994).

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[1] *See* Exhibit 1 hereto.

[2] *See* Exhibit 2 hereto.

13. On July 11, 1994, Mr. Soriano came to my office to review the requested contracts. After his review, he identified for me the excerpts from the contracts he wanted copied. I gave those excerpts to him pursuant to a cover letter dated July 11, 1994.[3] That letter requested that he keep confidential the excerpts from the contracts he had requested. Mr. Soriano agreed that the FTB would keep the documents confidential.

D. Agreements and assurances from FTB auditor Sheila Cox.

14. On February 17, 1995, Ms. Sheila Cox, a new FTB auditor, called to schedule an appointment to review Mr. Hyatt's documents at my office. We scheduled the appointment for February 23, 1995. I asked her to make as few copies of the documents as possible as I was concerned for the privacy of Mr. Hyatt since the documents were confidential. Ms. Cox told me that she would need to make the copies as these cases often take a long time to resolve.

15. On February 23, 1995, Ms. Cox came to my office to review the documents. I told Ms. Cox that Mr. Hyatt was very concerned with his privacy and the confidentiality of his papers and requested that the FTB only make copies of those documents that it really had to have in its files. I told her that the documents were always available for review at my offices. I told Ms. Cox that Mr. Hyatt is very concerned for his privacy and tries to maintain a very low profile in Nevada. *Ms. Cox assured me that everyone in the FTB was subject to the security and disclosure policy of*

[3] *See* Exhibit 3 hereto.

the FTB, the violation of which would cause an FTB employee to lose his job or worse. Ms. Cox gave me a copy of the FTB's security and disclosure policy to assure me and Mr. Hyatt that the materials and information that Mr. Hyatt was furnishing to the FTB pursuant to the audit would be kept confidential.

16. The FTB's security and disclosure policy is set forth in its Security and Disclosure Manual. The Manual provides that the policy is in place to encourage taxpayers to make full disclosure on their income tax returns without fear that the information will be revealed for some other purpose. The failure of an employee of the FTB to ensure confidentiality of the data can subject the employee to criminal action, disciplinary proceedings and potential loss of employment.[4] *The information subject to confidentiality imposed by the Manual includes any item of information that is submitted to the FTB* to administer its program responsibilities that is not specifically made public information by statute, including California tax return information.

E. Mr. Hyatt and I relied on the FTB representations of confidentiality.

17. Mr. Hyatt and I relied upon the representations of the FTB auditors and the provisions contained in the Manual that the highly confidential information Mr. Hyatt was providing to the FTB pursuant to the auditors' request would be maintained confidential. Ms. Cox said that

[4] A copy of the excerpt from the FTB security and disclosure policy presented to me by Ms. Cox is attached hereto as Exhibit 4.

she needed copies of everything, which I then agreed to send. She also requested authorization to get bank account information.

18. Under my cover letter dated February 28, 1995,[5] I sent the requested copies of Mr. Hyatt's bank account statements and canceled checks to Ms. Cox. *My cover letter noted that*, as I discussed with all of the previous Franchise Tax Board auditors, *all of the correspondence and materials furnished to the Franchise Tax Board by Mr. Hyatt were highly confidential*. My cover letter also noted that it was our understanding that such materials were to be retained in locked facilities with limited access. Ms. Cox did not question this statement.

19. On March 1, 1995, Ms. Cox acknowledged in a letter our meeting on February 23, 1995.[6] In that letter she acknowledged that Mr. Kern expressed concern about the [sic] Mr. Hyatt's privacy. She confirmed that she gave me documentation regarding the FTB security and disclosure policy. She promised that all documents sent to her would be kept confidential.

F. The FTB reconfirmed Mr. Hyatt's desire for privacy and his desire to keep his Las Vegas address confidential.

20. In my letter to Ms. Cox dated August 29, 1995,[7] I pointed out that the audit report issued by the FTB was

[5] *See* Exhibit 5 hereto.

[6] *See* Exhibit 6 hereto.

[7] *See* Exhibit 7 hereto.

misdirected because it mixed up Mr. Hyatt's residency with his concern over his privacy. My August 29, 1995 letter reconfirmed that Mr. Hyatt had been careful to protect his privacy as a result of past harassment and disruption of his work, but that his efforts to protect his privacy did not affect his residency. My August 29, 1995 letter further reminded the FTB that it had been informed since the outset of the audit that Mr. Hyatt was concerned with his privacy. My letter reiterated that, like many successful individuals, Mr. Hyatt put significant effort in protecting his privacy. My letter denied that Mr. Hyatt was concerned about kidnapping. My letter went on to note that, as part of maintaining his low profile, Mr. Hyatt asked fiends [sic] and colleagues to serve as trustees or open accounts with utility companies for Mr. Hyatt's personal residence; Mr. Hyatt also used P.O. boxes for his correspondence to maintain privacy. *My letter reconfirmed that Mr. Hyatt did not want his name publicly associated with his residence as he was trying to protect himself from undesirable contacts and had tried to insulate his name from readily accessible public records.* The letter expressed concern that the promises of confidentiality by the FTB had been compromised, because of the FTB audit report's failure to consider certain information provided by Mr. Hyatt to the FTB during the course of the audit and because of the duplicative requests made by the FTB for information during the course of the audit.

21. In the FTB's August 31, 1995 response[8] to my letters of August 29 and 30, 1995, *the FTB acknowledged*

[8] *See* Exhibit 8 hereto.

that Mr. Hyatt was a private person who put a significant effort into protecting his privacy and further acknowledged that the taxpayer did not want his name publicly associated with his residence, as was previously acknowledged by Mr. Shayer and Mr. Soriano.

G. Mr. Hyatt's frugal and unassuming lifestyle was explained to the FTB.

22. In my September 22, 1995 letter[9] to the FTB in response to its August 31, 1995 letter, I stated that the FTB dwelled on Mr. Hyatt's private nature, expressing its disbelief that an individual concerned about privacy would live in the modest home in which Mr. Hyatt lived. My letter doubted that the FTB was aware of the methods which successfully increased one's privacy. My letter noted that Mr. Hyatt's privacy had been successfully maintained because of his modest life style and because of his low profile; neither his home nor his apartment attracted the scrutiny of curious public or of his intrusive family (unlike high walls and gates which are noticeable and invite the curious).

23. In the FTB's September 26, 1995 letter to me,[10] the FTB acknowledged that Mr. Hyatt's belief that his modest life style and low profile helped him to maintain his privacy. The FTB letter notes that the FTB is aware of the methods which successfully increase one's privacy. The FTB's letter also acknowledged the taxpayer's desire to keep a low profile and to keep uninvited visitors out.

[9] *See* Exhibit 9 hereto.

[10] *See* Exhibit 10 hereto.

H. Mr. Hyatt's desire for privacy and desire to keep the address of his Las Vegas home confidential was reiterated to the FTB.

24. In my cover fax dated October 13, 1994 to Ms. Sheila Cox[11] where I transmitted our response letter to the FTB's letter of September 26, 1995, I noted that, because of the taxpayer's desire for privacy, I would be delivering the original letter with the underlying documentation personally to Ms. Cox.

25. In my October 18, 1995 letter to the FTB[12] responding to the FTB's August 2, 1995 penalty letter, I noted that our August 29, 1995 letter to the FTB *addressed Mr. Hyatt's desire to keep his name and address out of the public records* so that the harassment that he encountered in California would not follow him to Nevada.

I. In sum – the FTB was continually reminded of Mr. Hyatt's desire for privacy and confidentiality, and the FTB repeatedly promised to keep Mr. Hyatt's materials confidential.

26. I repeatedly expressed to the FTB Mr. Hyatt [sic] concerns over whether the FTB would maintain the taxpayer's records confidential and would conduct the audit in a professional manner. I relayed these concerns to the three auditors involved on Mr. Hyatt's audit, all of whom assured me that the materials furnished by Mr. Hyatt would be maintained confidentially and that Mr. Hyatt's desires were being respected. In the various

[11] *See* Exhibit 11 hereto.

[12] *See* Exhibit 12 hereto.

correspondence and the various contacts noted above, I continually reminded the FTB of the need for confidentially. [sic] Indeed, FTB protest officer Anna Jovanovich expressed acute awareness of Mr. Hyatt's concern for confidentiality – she went so far as to call Mr. Hyatt "paranoid." On another occasion she acknowledged in a letter Mr. Hyatt's concern for confidentiality.[13]

V. The FTB's standard for determination of residency and its application to Hyatt.

27. Based on the documents submitted by Mr. Hyatt and the audit file in whole, and applying the FTB's standard for determining residency, I saw no basis on which the FTB could conclude Mr. Hyatt was a California resident for the two periods in dispute – September 26 to December 31, 1991 and January 1 to April 2, 1992. In short, the FTB's own test for determining the date on which an individual is no longer a resident of California is two pronged: (i) physical presence by the individual in another state, and (ii) the intent by that individual to remain in that state. (California Revenue & Taxation Code § 17014; *Whittell v. FTB*, 231 Cal. App. 2d 279, 284, 41 Cal. Rptr. 673 (1964)).

28. The documents and information submitted to the FTB auditors demonstrated both: (i) Mr. Hyatt's physical presence in Nevada during most of the two disputed periods – except for short business trips that were well documented, and (ii) Mr. Hyatt's intent to remain in Nevada. My protest letter to the FTB dated June 20, 1996

[13] *See* Exhibit 13 hereto.

describes the information and documents presented to the FTB and best summarizes the strength of Mr. Hyatt's residency case as it demonstrates Mr. Hyatt's physical presence in Nevada during the disputed period and his intent to remain.[14] Of course, the best evidence of Mr. Hyatt's intent in September of 1991 to remain in Nevada, is the fact he has continued to live in Nevada since that time.

VI. The FTB's proposed assessment for the 1991-tax-year and its public dissemination by the FTB.

29. I was therefore disappointed when we received the FTB's "findings" in regard to the audit. A summary of these findings were sent by FTB auditor Sheila Cox in a letter dated August 2, 1995.[15] The FTB later issued a formal Notice of Proposed Assessment, dated April 23, 1996, against Mr. Hyatt for the 1991-tax-year.[16] This was almost three years after Mr. Hyatt received notice of the audit. The proposed assessment sought taxes totaling *$4,540,404.77*. I was even more disappointed when I learned that the FTB proposed to assess Mr. Hyatt not only income tax on his earnings for the period after his move to Nevada – September 21, 1991 through the end of 1991 – but was also proposing to assert a "fraud" penalty against Mr. Hyatt thereby increasing the assessment by 75% and seeking interest on both the tax and penalty from

[14] *See* Exhibit 14 hereto.

[15] *See* Exhibit 15 hereto.

[16] *See* Exhibit 16 hereto.

1991. As a result, the proposed assessment was equal to almost double the amount of tax that the FTB claimed was owned for the 1991-tax-year.

30. Despite the promises and assurances by the FTB of confidentiality, as the 1991-tax-year audit concluded, there were signs that the FTB was not keeping its promises. In my April 30, 1996 letter to the FTB, on which Ms. Cox was copied, I reminded the FTB of Mr. Hyatt's continuing requests regarding confidentiality and then chastised the FTB for its dissemination of the Notice of Proposed Assessment to an address Mr. Hyatt had not used for four years.[17] The FTB knew Mr. Hyatt [sic] current mailing address from the voluminous correspondence during the audit. Mr. Hyatt and I were therefore quite upset that the FTB choose [sic] one of the most confidential and potentially embarrassing documents to send to an address that it had not sent correspondence [sic] for years. The Notice asserted that Mr. Hyatt owed millions of dollars in taxes and penalties, and it apparently fell into the hands of a third party. I informed the FTB: "This is a breach of the confidential relationship that the FTB promised to maintain in handling this matter." Only after the FTB's production of its 1991-tax-year audit file did Mr. Hyatt begin to learn he [sic] full extent of the FTB's broken promises.

VII. Protest of 1991-tax-year assessment.

31. To preserve Mr. Hyatt's rights under California law (Cal. Rev. & Tax Code § 19044), I gave the FTB formal written notice on June 20, 1996, a lengthy and detailed

[17] *See* Exhibit 17 hereto.

protest letter.[18] As mentioned above, the protest letter notified the FTB of the significant evidentiary support contrary to the conclusion it reached in the audit. The protest letter also set forth in detail the reasons that Mr. Hyatt disputed the proposed assessment.

32. Once a protest letter is sent to the FTB, the matter then enters what is called the "protest" stage, during which the FTB assigns an in-house attorney to act as the Protest Officer, who in theory makes an independent review of the audit and a final determination concerning the proposed assessment before submitting a final assessment. The FTB emphasizes to taxpayers and their representatives that the protest officer conducts an independent review. As set forth in further detail below, Mr. Hyatt's protest is still pending, almost four years after his protest letter was submitted, almost seven years after he first received notice that he was being audited, and almost nine years after the tax year in question.

FTB audit and assessment for the 1992-tax-year and the FTB's multi-million dollar error.

33. Shortly after the FTB notified Mr. Hyatt of the results of the 1991-tax-year audit, the FTB informed Mr. Hyatt, through a letter sent to me dated January 19, 1996[19] that it was commencing an audit of Mr. Hyatt for the 1992-tax-year based on the results of its audit for the 1991-tax-year – even though Mr. Hyatt never resided in

[18] *See* Exhibit 14 hereto.

[19] *See* Exhibit 18 hereto.

California during 1992 and in April of 1992 had purchased his home in Las Vegas and moved into that home from his Las Vegas apartment.

34. The FTB later issued a formal Notice of Proposed Assessment, dated August 14, 1997, against Mr. Hyatt for the 1992-tax-year.[20] The proposed assessment for 1992 sought taxes totaling $5,669,021.00 and as well as a "fraud" penalty thereby increasing the assessment by 75%, and sought interest on both the tax and penalty from 1992. The total proposed assessment therefore for the 1992 tax year equaled $14,115,941.00. I timely submitted a "Protest" letter to the FTB on October 10, 1997 in regard to the FTB's proposed assessment for the 1992-tax-year.[21] The Protest for the 1992-tax-year is still pending.

35. The proposed assessment for 1992-tax-year contained an income error that caused the proposed assessment to overstate Mr. Hyatt's income by $24,000,000. In short, the FTB concluded that Mr. Hyatt was a resident of California through April 2, 1992, when he closed escrow on his Las Vegas home.[22] But the proposed assessment for the 1992-tax-year mistakenly assessed Mr. Hyatt for the income he earned during the month of December 1992.

36. I informed the FTB of this income mistake in a letter dated July 17, 1997 fully expecting that it would correct the mistake and issue an amended proposed assessment for the 1992-tax-year, but the FTB has failed

[20] *See* Exhibit 19 hereto.

[21] *See* Exhibit 20 hereto.

[22] *See* Exhibit 19 hereto.

to do so.[23] I made other attempts to have the FTB correct this income mistake,[24] but to this date the FTB is continuing to assess Mr. Hyatt for the December 1992 income, despite its own findings that he was not a resident of California at that time.

IX. Receipt of 3,500 page audit file and discovery therein of the FTB's audit conduct.

37. The FTB audit process is as secretive as a grand jury. The FTB takes the position that the individual subject to the audit has no right to review or receive a copy of the audit file until after the FTB has made its proposed assessment. I did request a copy of the audit file on May 1, 1996,[25] which was within a week after the FTB issued the proposed assessment for the 1991-tax-year. The audit file was not produced until October of 1996, which was well after the time I had submitted Mr. Hyatt's protest letter for the 1991-tax-year.

X. Settlement threats from the FTB's first protest officer.

38. The initial protest officer assigned to Mr. Hyatt's protest for the 1991-tax-year was Anna Jovanovich. I was informed that Ms. Jovanovich was the protest officer in a letter dated April 24, 1997 from Terry Collins.[26] From the

[23] *See* Exhibit 21 hereto.

[24] *See* Exhibit 20 hereto.

[25] *See* Exhibit 22 hereto.

[26] *See* Exhibit 23 hereto.

commencement of the protest in 1996, I have periodically spoken with or corresponded with each of the three successive protest officers, Ms. Jovanovich, Robert Dunn, and Charlene Woodward, to determine the status of the proceedings and inquire about time frame for resolution. In that regard, in June of 1997 I had lengthy conversation with Ms. Jovanovich wherein I inquired as to a time frame for resolution and again emphasized the strength of Mr. Hyatt's case given the documentary evidence submitted supporting his Nevada residency starting in September of 1991. During the discussion, without any prompting from me, she raised the issue of compromise and settlement. She first stated that she understood Mr. Hyatt to be very sensitive – she used the word paranoid – about his privacy and about his desire to keep the information submitted to the FTB confidential. She informed me that in high profile audits [sic] large dollar audits it was necessary for the FTB to engage in fact intensive, in depth investigations and inquire into many *unrelated* facts and questions. She emphasized that she would be sending me a lengthy letter asking for more documents and information.

39. Ms. Jovanovich informed me during this lengthy conversation that at this stage of the proceedings (*i.e.* the protest) most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public. The clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a "tax dodger." I understood Ms. Jovanovich to be suggesting that Mr. Hyatt enter into settlement discussions with the FTB concerning a compromise over the assessment of

taxes, penalties, and interest being assessed by the FTB. I relayed Ms. Jovanovich's statements to Mr. Hyatt.

40. At the time Ms. Jovanovich made the statements to me about settlement and avoiding disclosure of financial information and adverse publicity, we had already produced thousands of pages of information regarding Mr. Hyatt, his licensing business, and his financial position. She stated she would soon be making additional requests in a lengthy letter.

41. In August of 1997, approximately two months after my conversation with Ms. Jovanovich, the FTB sent its Notice of Proposed Assessment for the 1992 tax year. As explained above, it assessed not only penalties and interest, but contained mistake [sic] based upon the FTB's own admitted findings by including income from after the disputed periods. The FTB nonetheless assessed Mr. Hyatt taxes on his income through most of 1992, and assessed a fraud penalty for income earned both before and after April 4, 1992. The FTB's refusal to correct the mistake along with Ms. Jovanovich's suggestions concerning entering into a compromise with the FTB, call into question whether the mistake was innocent in nature, or intended by the FTB as another bargaining chip for negotiations and compromise.

XI. Commencement of this case.

42. Mr. Hyatt filed this litigation in January 1998, shortly after the 1992-tax-year-assessment. My only involvement has been as a potential witness. While the case has been pending, I have continued to represent Mr. Hyatt in the protests that are before the FTB for both the 1991 and 1992-tax-years. At no time have any of the three

successive protest officers assigned by the FTB informed me that the protest was being delayed, hindered, or in any way affected by this case.

XII. The Nevada litigation does not interfere with the protests.

A. Continuation of the protest.

43. I continued communicating with Ms. Jovanovich concerning the protest through early 1998 shortly after this litigation started. I received no further communications from the FTB concerning the protest until I received a letter dated October 27, 1998,[27] from Robert W. Dunn, stating that because of Ms. Jovanovich's retirement, he had been assigned to resolve Mr. Hyatt's protest for 1991-1992 tax-years. Mr. Dunn's letter stated that as soon as he was done with the initial review of my protest letters as well as the entire audit file and the documents we had submitted to Ms. Jovanovich, he would contact me. At no point in his letter did Mr. Dunn inform me that the protest was being delayed, stopped, interfered with, or hindered by the litigation in Nevada.

44. My next written communication from the FTB was a letter dated February 24, 1999 stating that Mr. Hyatt's protest for 1991 and 1992-tax-years had been reassigned to Charlene Woodward.[28] The letter stated that [sic] soon as Ms. Woodward completes her review of the file, she would contact me. The letter in no way indicates that

[27] *See* Exhibit 24 hereto.

[28] *See* Exhibit 25 hereto.

Mr. Hyatt's Protest was being delayed, stopped, or in any way interfered with or hindered by the Nevada litigation.

B. Isolation of protest officer from the FTB litigation team.

45. On or about March 2, 1999 I spoke by telephone to Ms. Woodward. Ms. Woodward provided me with some background concerning her work experience and her tenure with the FTB. She informed me that her instructions were to work on the matter and to analyze it independent from "everything else going on", which I understood to mean the Nevada litigation. She further told me that a "Chinese" law (what I understood to be an "ethical wall") was being constructed around her because FTB personnel working on the Nevada litigation were not to discuss the case with her. She told me that Mr. Dunn was no longer handling the protest because he was assisting in the Nevada litigation.

46. At no point did Ms. Woodward indicate to me that the protest or her work on the Protest was in anyway being delayed, stopped, interfered with, or hindered by the Nevada litigation. To the contrary, my understanding based on with [sic] Ms. Woodward's comments was that the Protest was proceeding on its own course independent of and irrespective of the Nevada litigation.

C. FTB recommencement of protest after Nevada court ruling.

47. On or about July 19, 1999 I placed a call to Ms. Woodward to inquire as to the status of the Protest. My call was returned by Terry Collins, whom I understood to be Ms. Woodward's supervisor at the FTB. Mr. Collins

wanted me to know that Ms. Woodward had been assigned to the protest and would soon start working on the Protest. I told Mr. Collins that I understood that Ms. Woodward had already been assigned to the case. Mr. Collins explained to me that at the outset of the Nevada litigation it appeared possible that the Nevada court would consider the residency matter and make a determination. As a result, Mr. Collins explained that the FTB did not devote resources to handling the Protest. In other words, I understood him to be saying that if the matter was going to be decided by a Nevada court, the FTB made a decision not to devote time and resources to working on Mr. Hyatt's Protest. I was surprised to hear this because it was contrary to my prior conversations and correspondence with the FTB at the commencement of the Protest and more recently wherein the FTB Protest officers – Ms. Jovanovich, Mr. Dunn, and Ms. Woodward – all gave me the distinct impression that the Protest was proceeding and would be resolved quickly.

48. Mr. Collins further explained to me during our July 19, 1999 telephone call that because it appeared that the Nevada court would not be considering the residency issue (i.e. the court had dismissed the declaratory relief claim), the FTB would again commence the Protest. He said I could expect a letter from Ms. Woodward that week confirming that she would begin her analysis. He informed me that afterwards it would take Ms. Woodward less than six months to respond. When I asked him if he thought I would hear from her within a couple of months, he thought it would be even less time. He also indicated that he had been meaning to call me to inform me that the FTB would start working on Mr. Hyatt's protest again. My letter of

July 23, 1999 letter [sic] to Mr. Collins confirms the substance of our conversation on or about July 19, 1999.[29]

XIII. FTB failure to follow its own internal policy for processing the protest.

49. On or about September 14, 1999, I called and spoke with Ms. Woodward to discuss FTB's Notice 99-1. This is a FTB internal document that sets forth the guidelines for processing the protest. It states that protests are typically to be handled within six months. Ms. Woodward informed me that she was not familiar with such [sic] form, but that she would check with others at the FTB. I then inquired as to how her work on the protest was progressing. She informed me that she had the protest for only one month and had just finished reviewing the file for the first time. She informed me that she had a number of questions six-nine [sic] (69) to be precise, that she had hoped to answer by re-reviewing the audit file. She did not know how long that would take, and that this was only the second protest she had ever been assigned. I eventually concluded the conversation by again asking Ms. Woodward to determine if a plan was in place within the FTB consistent with the FTB Notice 99-1 to resolve the protest within six months. After my telephone call, I faxed her a copy of the FTB Notice 99-1.[30]

50. On September 15, 1999, the day after my telephone conversation with Ms. Woodward, her supervisor Terry Collins called me. He asked me what I was seeking

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[29] *See* Exhibit 26 hereto.

[30] *See* Exhibit 27 hereto.

with respect to FTB Notice 99-1. I informed him that I was attempting to determine whether or not the FTB would be following the guidelines set forth in FTB Notice 99-1 in regard to Mr. Hyatt's protest. He informed me that FTB Notice 99-1 set forth guidelines, not rules. He further informed me that given the nature of the case, the guidelines would not be followed in regard to Mr. Hyatt's Protest because he thought the FTB's Chief Counsel would give permission to not follow the guidelines in this case. He then asked me what "I really wanted from the FTB." I informed him that I was trying to determine the expected time of receiving a response from Ms. Woodward in regard to the Protest. He concluded by stating that there could be no date proposed for anticipating completion. Again, there was no reference that Protest was being delayed, stopped, interfered with, or hindered by the Nevada litigation.

51. I confirmed my September 14, 1999, conversation with Ms. Woodward in a letter dated September 23, 1999.[31] I confirmed my September 15, 1999, conversation with Mr. Collins in a letter also dated September 23, 1999.[32]

XIV. FTB requests further information from Hyatt in the protest and finally sets hearing date for protest.

52. Having heard nothing further from the FTB for three months, on December 14, 1999, I sent Ms. Woodward two separate letters, one inquiring as to the status of Mr. Hyatt's Protest for the 1991 tax-year and the second one

[31] *See* Exhibit 28 hereto.

[32] *See* Exhibit 29 hereto.

inquiring as to the status of Mr. Hyatt's Protest for the 1992 tax-year.[33] The next contact I received from the FTB was a letter from Ms. Woodward dated December 30, 1999, that was 31 pages in length and sought answers to over 187 questions.[34] Ms. Woodward gave me sixty days to respond to her letter, a letter that had been in the works by her and prior FTB protest officers for over three years. Ms. Woodward's letter stated that she hoped to have a hearing on the Protest this June or July.[35] I understand this to be the lengthy letter Ms. Jovanovich alluded to approximately two and half years earlier.

53. On March 15, 2000 I again spoke with Ms. Woodward. She agreed that Mr. Hyatt could have a 90 day extension to answer the 187 questions she posed in her December 30, 1999 letter, so long as we mutually agree [sic] on a hearing date. She then stated that a hearing in the protest would be held in September or October of this year. She emphasized that the FTB intended to, and would, conduct the hearing and have the protests complete by early this Fall.

XV. The FTB auditor issued a perjured subpoena to try and acquire information about Mr. Hyatt.

54. In May of 1998 I received correspondence from Sheila Cox attached to which was a subpoena she had issued on the FTB's behalf to CalFedBank. The proof of

[33] *See* Exhibit 30 hereto.

[34] *See* Exhibit 31 hereto.

[35] *See* Exhibit 31 hereto.

service attached to the subpoena sworn under oath that I had been personally served with the subpoena on May 28, 1998.[36] The proof of service was wrong because I was not served personally that day or any other. The subpoena also violated the California Financial Information Privacy Act that requires the consumer (here Mr. Hyatt) be served notice of the subpoena ten days prior to the due date of the subpoena. The due date on the subpoena was May 28, 1998, the same day it falsely states I was personally served.

55. On June 3, 1998 I spoke with Ms. Cox who confirmed that the subpoena was served on the bank prior to the ten day waiting period. She said that the FTB often does this because the banks take so long to respond.

56. Ms. Cox also informed me that the FTB had subpoenaed Cal Fed because Ms. Jovanovich, the protest officer, thought that a number on a document Mr. Hyatt produced was a secret bank account number. It was actually a bank branch number. In other words, Ms. Jovanovich mistakenly thought it was a secret bank account that Mr. Hyatt was hiding. She therefore instructed Ms. Cox to subpoena the records directly from the bank. To Mr. Hyatt's great embarrassment, the subpoena was served on the bank and falsely stated that Mr. Hyatt had provided incomplete information during the FTB's investigation of him.

57. Not only was this not true, but by not giving Mr. Hyatt the required ten day notice he was unable to correct

[36] *See* Exhibit 32 hereto.

the FTB's mistake prior to its embarrassing and false representation to the bank. If the FTB had called me first to request the "secret" account information, the matter would have been clarified without the FTB making false statements about Mr. Hyatt and without invading his privacy.

Further your affidavit sayeth naught.

DATED this 20th day of March, 2000.

/s/ Eugene G. Cowan
EUGENE G. COWAN

SUBSCRIBED and SWORN to before me
this 20th day of March, 2000.

/s/Mary E. Mc Dermott
NOTARY PUBLIC

[SEAL]
MARY E. MC DERMOTT
Commission #1166658
Notary Public – California
Los Angeles County
My Comm. Expires Jan 16, 2002

CONFIDENTIAL H 01543

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RICHARD J. RJORDAN
(RETIRED)

FILE NO.
08-160-002

February 28, 1995

BUR MAR 01 1995 REC'D

Ms. Sheila Cox
Tax Auditor
Franchise Tax Board
333 N. Glenoaks Boulevard
Suite 200
Burbank, California 91502-1170

Re: Gilbert P. Hyatt – 1991 Taxable Year

Dear Ms. Cox:

Per your request, enclosed are copies of the taxpayer's bank account statements and cancelled checks for the Nevada bank accounts he maintained in 1991 and 1992. As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access.

We appreciate your understanding and cooperation.

Sincerely,

/s/ Eugene G. Cowan
Eugene G. Cowan
of RIORDAN & McKINZIE

EGC:pmc

Enclosures

CONFIDENTIAL H 01531

STATE OF CALIFORNIA [SEAL]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD. SUITE 200
BURBANK, CA 91502-1170
TELEPHONE: (818) 556-2942
3/1/95
Mr. Michael W. Kern CPA
c/o Piercy, Bowler, Taylor, & Kern
6100 Elton Ave. #1000
Las Vegas, Nevada 89107

Re: Gilbert P. Hyatt
1991

Dear Mr. Kern:

Based upon my meeting with Mr. Eugene Cowan at his office last week, I am submitting the following revised list as a document request for items needed to complete the audit. You had indicated your concern about the taxpayer's privacy. I have given Mr. Cowan documentation regarding the FTB Security and Disclosure Policy. I can assure you that all documents sent to me will be kept private.

I had indicated to Mr. Cowan that I will need copies of all of the bank information which I examined at his office on February 23, 1995. He said that he would send copies of these documents to me. I had also indicated that I would need to request the other bank information for the California bank accounts. In order to do this, I will need signed authorization from the taxpayer. Mr. Cowan had indicated that the taxpayer would be willing to do so. I have enclosed the FTB Form 2590 for each entity. Please have the taxpayer sign each form and send these back to me by March 20, 1995.

Some of the information obtained at the meeting was not complete, so I will have to request information such as account numbers, etc. I have indicated on the next page where such additional information is needed.

[LOGO]
Z 739 601 109
Receipt for
Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to
c/o Piercy, Bowler, Taylor
Michael W. Kern CPA

Street and No.
6100 Elton Way #1000

P.O., State and ZIP Code
Las Vegas NV 89107

Postage $

Certified Fee

Special Delivery Fee

Restricted Delivery Fee

Return Receipt Showing to Whom & Date Delivered

Return Receipt Showing to whom, Date, and Addressee's Address

TOTAL Postage & Fees $

Postmark or Date 3/1/95 Cox

PS Form 3800, March 1993

CONFIDENTIAL H 01533

CREDIT CARD INFORMATION

4. I will need the taxpayer to request the statements from the credit card companies himself. I have called the credit card companies, and they do not provide third party information. I believe that the cost of obtaining the statements, if any, is minimal. I will need the statements for all of 1991 and all of 1992. The following account statements are needed:

Credit Card Accounts:

Household
4317-3410-1024-2499

Household
5418-2961-4100-6386

Household
5414-7410-1018-2135

Chase
4226-563-134-706

Bank of New York
5417-4000-4552-7056

MBNA
5329-0312-5816-5925

TELEPHONE INFORMATION

Regarding the telephone information, I will investigate to determine how long each company retains the billing statements. At a later date, I may decide to request authorization from the taxpayer to determine dates that the service was established, etc.

Thank you for your cooperation in this matter.

If you have any questions, please feel free to call.

Sheila Cox
Tax Auditor

cc: Eugene Cowan

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive, Defendants.	)	Case No. A382999

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE SIATTA

Taken on Friday, April 21st, 2000
At 9:10 o'clock a.m.
Las Vegas, Nevada

Reported by: Carre Lewis, CCR 497

* * *

[41] trying to assess, we think, fraudulently, we think without proper motive or proper basis, a procedure whereby we would have my client give up millions of dollars in his money to the State of California. That's a business. That's a commercial transaction, I think, for the purposes of the negligent misrepresentation claim.

MR. WILSON: Your Honor, may I put a question?

THE COURT: Certainly.

MR. WILSON: For the record, my name is Thomas Wilson. I'm counsel for Franchise Tax Board.

THE COURT: Welcome.

MR. WILSON: George Takenouchi is also present with me.

THE COURT: Welcome.

MR. WILSON: And also present is Robert Dunn who is counsel of the department itself. I have a question with respect to the scope of this case. And Mr. Bourke made a comment about injuries which occurred here which the parties wish to litigate. I have a question for the Court. And that is, does the Court see this case as being limited to actions which occurred within Nevada? The court raised a basic threshold question here which is the extent of the privilege. Is it limited or is it absolute when we talk about sovereign immunity, whether it's absolute or whether it's limited. And I understand the question which the court [42] puts. Are we talking about actions limited to those which occurred in the state of Nevada or are we talking about trying the entire audit in California as well?

Now there are procedures for the trial and the resolution of a claim of tortious actions which occurred within the state of California. But we have a very basic question here which I believe there is some degree of confusion. And that is, are we litigating what occurred in Nevada or are we trying the entire audit, whether in California or Nevada? It makes a vast difference in the scope of this case. It makes a vast difference in the scope of the discovery and certainly the duration of the case. That would be helpful to us, I think, if we have a common understanding of that.

THE COURT: I think that's a fair question. And while I wish that I could give you a simple blackline answer, to suggest to you that I wish to revisit or otherwise litigate

the entire audit would be an incorrect statement. That, in its entirety, is not the subject matter of this lawsuit, frankly.

On the other hand, to limit the environment of this lawsuit merely to acts which occurred in Nevada would be to narrow it far too technically. I believe that acts that could occur in any number of places, not limited to Nevada, certainly not limited to the state of California, [43] but that none the less would affect the plaintiff here in the state of Nevada. So to give you a limitation with respect to only those acts that occurred in Nevada, I can give you an unequivocal no. We are not limiting it to that extent.

On the other hand, however, I can assure you that I have no desire, nor do I think that this lawsuit frames the complaint in such a manner that would cause us to revisit the entire audit that gives rise to this lawsuit. And I don't know that that's as helpful as you perhaps had hoped it might be.

MR. WILSON: Maybe this is a work in progress, Your Honor.

THE COURT: Oh, I think it is.

MR. WILSON: And I think it's one that we probably need to define. In fairness to the court, it's going to be more difficult for you than it is for we. Because we are involved in the case and you see it from time to time. But for, I suppose, an effective trial of this case, if it gets that far, if it is not limited or disposed of on motion, I guess we are going to have do [sic] reach a point where the Court and we understand the limits of the factual issues and the limits of the legal issues which

are going to be reserved for trial if indeed the court decides it wants to try this case and we don't dispose of it on motion.

* * *

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive Defendant.	) Case No. A382999) Dept No. XVIII) Dckt No. F)) **ORDER**)) (Filed May 31, 2000)

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L.

Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

DATED this 31 day of May, 2000.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE
NANCY M. SAITTA

SUBMITTED BY:

/s/ Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
HUTCHISON & STEFFEN
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

APPROVED AS TO FORM BY:

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive, Defendant.	) Case No. A382999) Dept No. XVIII)) **NOTICE OF ENTRY OF ORDER**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that on May 31, 2000, an Order was entered in this case, a copy of which is attached hereto.

DATED this 1st day of June, 2000.

HUTCHISON & STEFFEN

By: /s/ Mark A. Hutchison
Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

[Certificate of Service Omitted In Printing]

CERTIFIED COPY

BEFORE THE

SUPREME COURT OF NEVADA

FRANCHISE TAX BOARD OF CALIFORNIA, Plaintiff, v. DISTRICT COURT, Defendant.	)	RECEIVED MAR 19 2001 No. 35549/36390

TRANSCRIPT OF PROCEEDINGS

Friday, February 9, 2001

* * *

[12] deposition just for her going over this case brick by brick.

THE COURT: But I thought the only issue was the residency.

MS. WILSON: The only issue was the residency.

THE COURT: That's according to your client's –

MR. WILSON: Well, imaginative lawyers can think of a lot of questions to ask, and a lot of questions about FTB policy and practice and procedure and how you reach judgments and all of this sort of thing in an attempt to make a case.

16,000 documents have been produced in this case as a result of the discovery master's ruling of its ratification by the district court judge. 16,000. We're litigating the

audit. We're not litigating a willful tort or something that happened outside the scope of employment of governmental duty. We're litigating the audit.

There's a substantial question here as to whether or not a sister state's court in these circumstances has subject matter jurisdiction [13] to hear and try this case and reach a judgment with respect to the performance of the sovereign activity.

Now, there's – the ruling of the district court discovery master were that the entire audit is at issue, not just what happened in Nevada. The entire audit, the 97 percent of the activity in California.

I do want to reserve a couple of minutes before my friends of the opposition speak, and so I'll sit down. Thank you.

THE COURT: Mr. Wilson, you may respond.

MR. BURNHART: Thank you. And good morning, Mr. Chief Justice, members of the court. My name is Peter Burnhart, and I represent the real party in interest, Gilbert P. Hyatt.

I'd like to focus the Court on three very well-established principles of law which I think will control the decision in this case.

First, Nevada – in fact, all states have a legitimate interest in providing their residents with redress for wrongful conduct of others. Very simple proposition; whether that wrongful conduct is committed by a private

* * *

[17] torts. We're not talking about negligence, I agree. We're talking about intentional torts which this state traditional [sic] has said are not immune when government agents commit intentional torts.

THE COURT: Mr. Burnhart, could you just in everyday, ordinary language tell me what those intentional torts are.

MR. BURNHART: Sure.

THE COURT: Written petition, we don't have (inaudible).

MR. BURNHART: I understand. And, again, I think that's a good point. That, in essence, what we're saying is that the FTB improperly disclosed private, confidential information to Hyatt after pledging to respect that confidentiality.

All of those acts were directed into the State of Nevada. And Mr. Wilson talks about 97 percent being in the State of California. Menecke is a good example of a case where the State of Wisconsin injected itself into the State of Nevada by sending the parolee here.

That's exactly what we're talking about here. The State of California through all of [18] its activities injected itself into the State of Nevada invading Mr. Hyatt's privacy.

THE COURT: Where did the alleged violation of privacy occur, in Nevada or California?

MR. BURNHART: It took place in both places.

THE COURT: (Inaudible) in California or –

MR. BURNHART: No. No. We're only saying that we're suing for the wrongful acts or the improper acts of the State of California. And we believe that all of the actions that California took was [sic] directed at a Nevada resident in the State of Nevada. And you can't simply put up a border around the state and say, you can't – or you can commit wrongs in another state but have an effect in Nevada without having to answer for that.

There are a couple of cases that we've cited in the brief. Menecke is a good example. Wisconsin acted in Wisconsin, but when the parolee assaulted the (inaudible) child in Reno, that action took place in Nevada. But the action that caused it took place in the [19] State of Wisconsin entirely.

You have Burnhart vs. Harrah's Club. It's a California case, but Harrah's Club was protected in Nevada by a – the absence of a (inaudible). California had no trouble saying that even though all Harrah's did was serve liquor in the State of Nevada, because the driver then crossed the state border and committed a tort, Harrah's can be liable for actions which took place solely within the State of Nevada.

So the concept that a particular defendant can commit a wrongful act which has effects across the state border is not a foreign concept at all. That's the only way tort law can be effective.

THE COURT: Well, couldn't Nevada become a sanctuary, sort of a (inaudible) for taxpaying – non-taxpaying California residents who move to Continental Hotel and say, We're not a resident, sue, be damned. We're going to stay here and you can't touch us.

MR. BURNHART: No, I don't think that's a real fear. What you have here is a situation where if the FTB commits only lawful acts, [20] Nevada is not a haven. We're not challenging the fact that they made a discretionary decision to conduct residency audits as part of their policy. We're not challenging the fact they decided to audit Mr. Hyatt.

In fact, Mr. Wilson has conceded today, there is no interference with that audit process because it's going forward in California. We – and this tort case is distinguishable; separate facts, separate law, separate theories, separate damages. So what happens is if California wants to conduct an audit in Nevada, this action by Mr. Hyatt doesn't stop them.

All this action says is if you come into our state and commit torts, this court has jurisdiction and will adjudicate those torts. Our residents are entitled to a day in court. If you come into our state and don't commit a tort, there will not be a cause of action in Nevada.

THE COURT: Can you describe a little more clearly what those torts are?

MR. BURNHART: Sure. The torts are the envision [sic] of privacy.

[21] THE COURT: 16,000 pages of documents ought to be a tort in itself.

MR. BURNHART: I appreciate that. There are certain things which the FTB has done, and I have one example from the record. They issued a demand to furnish information, sealed in the State of California, and it says, "The people of the State of California to," and then they fill

in the blank, "in the matter of Gilbert P. Hyatt. This demand requires you to furnish this information."

Now, we know that a Nevada agency cannot issue a subpoena to people in California. And yet California decides they're going to use their power, and they cite their statute, Section 19504, the California Revenue Code, and send subpoenas, documents called subpoenas, "Greetings, you have to provide all of this record to us."

The one example I have here, "Please give me the dates of contributions to your church. Give me the date of the church application. Give me the record – you're required to give me the record of all attendance of Mr. Hyatt at all of your church meetings, services and [22] functions."

They came into Nevada without warrant, went to Mr. Hyatt's home, talked to his mail man, talked to his garbage collector. They advertised the fact by taking a picture in front of Mr. Hyatt's home called the trophy picture. We got it.

They went to his ex-wife after a bitter divorce. And, again, just to keep this in perspective, we're not talking about actions that occurred in 1991 when Mr. Hyatt was a resident of California. We're talking only about conduct occurring from 1993 forward, long after the FTB agrees that Mr. Hyatt was a resident of Nevada.

Not a situation where Mr. Hyatt was being audited in California and thought, "Hey, if I move to Nevada, maybe I'll be able to stop California from pursuing me." California knew nothing about him. He was below the radar screen in 1991, 1992, 1993, long after he moved here.

They read an article in a newspaper, talked about this Nevada resident that had acquired some wealth. What happened at that [23] point? Well, his ex-wife, been divorced from over twenty years from the early '70s, sued him in California saying that his twenty years of toiling in the garage in poverty, working on computers, even though they were divorced in the early 1970s, she now in 1993, '94, '95 when he suddenly saw the fruits of those labors come out, sued him. This was in the newspapers.

The FTB reads the newspaper and says, Hey, maybe we can do something. Maybe we can get some money out of this guy. This would be the largest fish in the pond, the biggest residency tax audit.

THE COURT: I don't blame them. There was a $41 million income one year when the residency was disputed. I can't blame a bureaucrat in California for (inaudible) in the case.

MR. BURNHART: And we don't challenge that.

THE COURT: – $41 million dollar taxpayer's (inaudible) to go to Nevada when California has more of them.

MR. BURNHART: We don't challenge that. They had every right to do that. We're not [24] challenging the decision to do the audit. We're challenging the way they conducted the audit, the conduct, the tortious conduct, the wrongful conduct.

If there is not a forum to redress that – and California doesn't provide that understanding. What's going to happen in the residency audit is they will either affirm or change or reject the decision of the auditors on how much tax he owes in California.

Nevada, Judge Saitta was very, very clear in this. She threw out the declaratory relief claim saying that would get too close to questioning whether or not the audit assessment was legitimate. All you can sue on in Nevada are the tort claims, and those very clearly provide a different remedy.

You talk about proof, the elements of a tort. You have to prove the wrongful act. You have to prove that it caused damages. You're not saying it had to cause this amount of tax not to be owed. Those are apples and oranges. We're not trying to and we are not interfering with that audit in the State of California.

THE COURT: Well, Mr. Burnhart, then why [25] are you discovering the entire facts and documents (inaudible) if you're just talking about several discrete tortious acts in the residency, I guess that's even California? Why do you need the entire audit file and all the records and all of these depositions?

MR. BURNHART: Well, the questions that we've asked, and they're in the record, are what did you, Auditor A, do? What acts did you perform on the Hyatt audit? Auditor B, Auditor C, different people, what did you do?

They're very, very much proper questions. And judge – Discovery Commissioner Biggar went through hours and hours and, as you say, thousands of pages of documents and made what I think is a very reasonable decision. He didn't go entirely Mr. Hyatt's way.

He said that when you're alleging the tort, you have to prove what they did to invade the privacy. How did they violate Mr. Hyatt's rights? How did they commit these

negligent misrepresentations, the fraud, the extortion? How did they do it?

You have to ask them what they did. All of that information is solely within the [26] provence of the FTB audit division. We have to ask those questions. And the appropriate way to control a piece of discovery, as you know very well, is for the discovery commissioner to limit it. That's his job.

And our system works very well when each component of the system does its own job. Discovery commissioner worked very hard over several hearings, nine months of review, and made, I think, a very fair decision on the discovery. And the fact that the FTB has to defend itself in a lawsuit is not [sic] extraordinary type of hardship. Everybody – everybody faces that.

The State of New Jersey had a case, the McDonald case, where they said the State of Illinois and its tax collection efforts cannot come into the State of New Jersey and commit employment discrimination against one of its employees, one of its residency auditors. If it does, then they have to answer for those wrongful acts and they have to defend it. They have to submit to deposition. That can be intrusive on their ordinary day-to-day activities, but that's what dispute resolution [27] is all about. So there's nothing odd or unusual about those concepts.

I know I don't have very much time left. I just want to reiterate, in order for this court to close these doors to Mr. Hyatt, it has to find first that it can overrule Nevada v. Hall, U.S. Supreme Court precedence, on point, binding, that this court, the Nevada court's have the power to litigate the case against California.

I believe you also would have to overrule Menecke to say that even though Wisconsin projected its acts into Nevada and you held that that was sufficient, comity is not appropriate. When it's the State of California, you now need to say, Okay. We will grant comity to California. I'm not sure how you make that decision.

You would have to disregard established precedence that government agents are not liable for intentional and operational acts, well-established Nevada law, and finally disregard the district court and the discovery commissioner's incredible efforts to review the facts and law applicable to this case.

* * *

Mark A. Hutchison (4639)
John T. Steffen (4390)
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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No. 36390 **REAL PARTY IN INTEREST GILBERT P. HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL*** (Filed Jul. 5, 2001)

TABLE OF CONTENTS

		Page
I.	Issues presented	1
	A. Did the Court overlook or misapprehend genuine, material facts at issue when it concluded "that there is no probative evidence to support Hyatt's [tort] claims?"	1
	B. Did the Court overlook or misapprehend the law when it granted the FTB's petition "on grounds other than those alleged in the petition?"	1
II.	Summary of argument and relief requested	1
III.	The Court has overlooked or misapprehended Hyatt's substantial evidence of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's private facts	1
	A. Elements of claim	1
	B. Supporting evidence	1
	1. Hyatt reasonably expected an audit by the FTB with no public disclosure of his private information	2
	2. The FTB unreasonably and illegally divulged Hyatt's private facts	4
	i. The FTB wrongly disclosed the address of Hyatt's secret research lab	4
	ii. The FTB wrongly disclosed Hyatt's social security number	5

iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being investigated, thereby destroying Hyatt's patent licensing business..... 5

IV. The Court has overlooked or misapprehended substantial evidence of the FTB's fraud..... 6

A. Elements of claim..... 6

B. Supporting evidence..... 6

1. The one-sided fraudulent audit..... 6

2. The $9 million fraud penalty and the FTB's urging Hyatt to settle..... 8

3. Hyatt was damaged by the FTB's fraud..... 9

V. The Court overlooked or misapprehended the law when it granted the FTB's petition "on grounds other than those alleged in the petition."..... 10

VI. Hyatt again requests leave to file an additional briefing specifically addressing the evidentiary support for his claims..... 10

I. Issues presented.

A. Did the Court overlook or misapprehend genuine, material facts at issue when it concluded "that there is no probative evidence to support Hyatt's [tort] claims?"

B. Did the Court overlook or misapprehend the law when it granted the FTB's petition "on grounds other than those alleged in the petition?"

II. Summary of argument and relief requested.

Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct. Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule space to describe – *for the first time to this Court* – his specific claims and the evidence that has been overlooked or misapprehended by the Court. Despite an enormous record, he has space here to address a scant portion of the sufficient probative evidence *in the record* of prima facie claims regarding: (i) a single invasion of privacy claim – disclosure of private facts – and (ii) his fraud claim. Hyatt has equally strong supporting evidence for his various other related tort claims, but no space to address them. Hyatt therefore requests rehearing on all of his tort claims. Surely this Court must accord respect for the fact that the district court *twice* validated Hyatt's tort claims, the discovery commissioner saw and heard sufficient evidence to indicate that the FTB may be guilty of fraud, and even the FTB did not challenge in its writ petition the sufficiency of Hyatt's evidence. Indeed, the record is irrefutably alive with supportive evidence.

III. The Court has overlooked or misapprehended Hyatt's substantial evidence of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's private facts.

A. Elements of claim: (i) disclosure or publicity of private facts; and (ii) a reasonable expectation of privacy in regard to the disclosed facts.[1]

[1] This claim is really two: the more recently emerged invasion of informational/constitutional privacy and the more traditional branch of

(Continued on following page)

B. Supporting evidence:

The evidence establishes beyond any doubt that the FTB violated its own non-discretionary rules, regulations, and procedures in illegally disclosing Hyatt's private information and thereby injuring Hyatt. Regardless of whether an individual owes taxes to California, the FTB has no right to ignore its own confidentiality requirements and commit actionable privacy torts under the guise of a tax audit. This claim, and all of Hyatt's claims, are for torts committed by the FTB irrespective of the independent tax proceeding in California.

The Court incorrectly concluded that Hyatt's only evidence in support of this claim (and all others) consisted of his own allegations. The Court overlooked a record replete with documentary evidence, affidavits, and depositions of third persons that establish this claim.

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disclosure of private facts. Each claim involves the disclosure of private facts for which an expectation of privacy had been created and for which a reasonable person would find offensive – particularly informational/constitutional privacy under which disclosure of private, personal information gathered by the government is *per se* unlawful. *See* detailed discussion in Hyatt's opposition to the FTB's motion for summary judgment on pages 21-26 and 31-33, respectively, [*Appdx., Exh. 27*]. *See also* Cal. Const., Art. I, Sec. 1. For the Court's convenience and for clarity in this petition, Hyatt has attached an Appendix hereto containing copies of all exhibits cited herein. Hyatt cites to the attached Appendix in the following format: [*Appdx., Exh. () "x"*]. All exhibits included in the attached Appendix are materials from the record before the Court, and the record cite for each exhibit is set forth in the table of contents for the Appendix.

1. Hyatt reasonably expected an audit by the FTB with no public disclosure of his private information.

As addressed below, based on the FTB's own published regulations, statutory requirements, and explicit representations to Hyatt and his representatives, Hyatt rightly and reasonably expected that the FTB would keep his private information confidential. Hyatt's heightened privacy concerns were, he thought, allayed by the FTB's explicit promises to Hyatt and citations of law mandating confidentiality.

There are numerous examples of FTB publications mandating confidentiality. "It is the *auditor's* responsibility to maintain the security of *all* confidential data during the audit process and to prevent *any* unauthorized disclosure."[2] The FTB is forbidden from providing "confidential information to persons to whom issuance of this information has not been authorized."[3] The FTB emphasizes: "It is the responsibility of FTB agents to ensure that confidential information is not disclosed to unauthorized persons."[4] Auditors are instructed: "*If in doubt, don't disclose*," repeating this mandatory, non-discretionary requirement 16 times in 14 pages in one manual.[5] The FTB even warns its auditors of possible private lawsuits for unauthorized

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[2] FTB Field Audit Manual, at FTB 3762 [*Appdx., Exh. 1*].

[3] FTB Statement of Incompatible Activities and Rules of Conduct, at (1) paragraph I(3) [*Appdx., Exh. 2*].

[4] FTB Disclosure Education Manual, at 11 [*Appdx., Exh. 3*].

[5] FTB Disclosure Education Manual, emphasis in original [*Appdx., Exh. 3*].

disclosures.[6] Yet, included in the FTB's definition of confidential information is the very type of information it disclosed regarding Hyatt.[7]

The record is overflowing with evidence, testimonial and documentary, that provided Hyatt with an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB promised "confidential treatment of any personal and financial information from the auditor assigned to you."[8] In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,[9] that represented to Hyatt that the FTB was subject to the California privacy act[10] and was required to disclose "why we ask you for information." The FTB indicated that it would only share information with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's private information to non-governmental third parties at the unfettered discretion of its auditors.* It nonetheless did so on a grand scale as summarized below.

[6] FTB Disclosure Education Manual, at 14 [*Appdx., Exh. 3*].

[7] FTB Statement of Incompatible Activities and Rules of Conduct, at (3), paragraph II(2), at (5), paragraph IV, and at (7), paragraph IX [*Appdx., Exh. 2*]; FTB Disclosure Education Manual, at 4 (emphasis added), at 5, and at 13 [*Appdx., Exh. 3*]; and FTB Security and Disclosures Manual, at H 06603, H06659 [*Appdx., Exh. 4*].

[8] FTB Form #1131 [*Appdx., Exh. 5*].

[9] FTB Form #1131 [*Appdx., Exh. 5*].

[10] Officially known as the California Information Practices Act of 1977 ("IPA"), Cal. Civ. Code §§ 1798 *et seq.*

The affidavit of Eugene Cowan, Hyatt's tax attorney, explained in great detail the lengths Hyatt and his representatives went to obtain assurances from the FTB regarding confidentiality.[11] The FTB clearly understood Hyatt's compelling need for keeping not only his private information confidential but also the fact that he was being audited to the point that Hyatt's insistence upon confidentiality was so non-negotiable that the FTB promised strict confidentiality as a *quid pro quo* for obtaining the information and documents its auditors claimed it needed to complete the audit.[12]

Hyatt is by all accounts, a recognized world-class inventor, researcher and licensor whose demands for strict confidentiality were solidly based upon concerns of industrial espionage and theft of trade secretes.[13] Having previously experienced the disastrous effects of security leaks early in his career,[14] Hyatt's need for confidentiality was paramount, as he had licensed many of the world's largest corporations on crucial technologies and was negotiating with many others.[15] The FTB was keenly aware that Hyatt's privacy concerns were both reasonable and non-negotiable, as his secret research lab and secret document files were located in a highly confidential setting not available or discernible as such to the public.[16] Security

[11] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*], submitted in opposition to the FTB's motion for summary judgment.

[12] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

[13] Hyatt Affid., ¶¶ 18b, 131, 137 [*Appdx., Exh. 7*].

[14] Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

[15] Hyatt Affid., ¶¶ 44, 67, 85, 86 [*Appdx., Exh. 7*].

[16] Hyatt Affid., ¶¶ 10-133, 137 [*Appdx., Exh. 7*].

was so important to Hyatt that he even purchased the facility containing his research lab and invaluable documents through the Kern trust[17] to avoid public disclosure.

2. The FTB unreasonably and illegally divulged Hyatt's private facts.

In violation of the FTB's non-discretionary regulations and statutory requirements, as well as its explicit representations to Hyatt, and contrary to this Court's "findings" that the FTB "complied with its internal operating procedure" and acted "in line with a standard investigation . . . pursuant to its statutory authority," the FTB publicly, repeatedly, and defiantly disclosed Hyatt's private information.

i. The FTB wrongly disclosed the address of Hyatt's secret research lab.

The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated outrage.[18] Despite express assurances that it would not reveal Hyatt's secret information, the FTB violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies, including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water

[17] Michael Kern is a prominent Certified Public Accountant in Las Vegas.

[18] Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [*Appdx., Exh. 8*].

District[19] and to three separate newspapers.[20] As a result, Hyatt's painstaking care in locating, securing, and protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation would consider to be of compelling importance.[21]

This reprehensible effort to publicly expose Hyatt's secret address resulted in a major security risk and loss of time and money. As a direct result of the FTB's deliberate privacy violation, Hyatt was forced to purchase another Nevada property, under another trust, and move the research lab, his sensitive documents, and intellectual property to this new location.[22] Since 1995 when the FTB publically disclosed the secret research lab address, various ones of Hyatt's most sensitive trade secrets have appeared in commercial products and in publications.[23]

ii. The FTB wrongly disclosed Hyatt's social security number.

Hyatt had strong reasons to expect that the FTB would respect his right to keep his social security number confidential given FTB representations and published

[19] Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [*Appdx., Exh. 9*].

[20] Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [*Appdx., Exh. 10*].

[21] Hyatt Affid., ¶ 137-138 [*Appdx., Exh. 7*].

[22] Hyatt Affid., ¶ 138 [*Appdx., Exh. 7*].

[23] Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

policies. Yet, the FTB made over *40 unauthorized and illegal disclosures to third parties.*[24] *None* of the recipients were disclosed to Hyatt in advance, as was required by law and FTB regulation, before the FTB disclosed a taxpayer's social security number.[25]

iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being investigated, thereby destroying Hyatt's patent licensing business.

After assurances of strict confidentiality, Hyatt reluctantly agreed to provide excerpts of his agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in the Licensing Executives Society.[26] Hyatt contractually committed to his Japanese licensees that the agreements would remain strictly confidential.[27] The FTB violated Hyatt's privacy rights by sending excerpts of the licenses to his Japanese licensees, making clear that Hyatt was under investigation by the FTB, and disclosing that the licensing agreements had been disclosed by Hyatt in violation of the agreements' confidentiality provisions.[28]

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[24] Portions of FTB 1991 tax year audit file [*Appdx., Exh. 8*].

[25] IPA, § 1798.15 [*Appdx., Exh. 12*]; FTB Security and Disclosure Manual, at H 06706 [*Appdx., Exh. 4*].

[26] Hyatt Affid., ¶ 138 [*Appdx., Exh. 7*].

[27] Cowan Affid., ¶¶ 8-26 [*Appdx., Exh. 6*].

[28] FTB 02143 and 02147 [*Appdx., Exh. 11*].

The effect of the licensing disclosures by the FTB in breach of its commitment to Hyatt and the confidentiality clause of the licenses, was significant. Hyatt's patent licensing business was destroyed. From the time of the FTB's unlawful disclosure, Hyatt has obtained no new licensees at all, and his royalty income from new licensees dropped to zero.[29]

The record thus reflects, irrefutably, that there was widespread, unlawful dissemination of Hyatt's personal and confidential information by the FTB. At least 90 pieces of correspondence were disseminated by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective membership totaled in the thousands.[30]

IV. The Court has overlooked or misapprehended substantial evidence of the FTB's fraud.

A. Elements of claim: One or more knowingly false representations, made with the intent it be relied upon, and it is reasonably and detrimentally relied on by a party, resulting in damage to that party.[31]

B. Supporting evidence:

The FTB made two types of false promises to induce Hyatt's cooperation with the audit: (i) that the FTB would keep Hyatt's information confidential, and (ii) that the FTB would conduct a fair, unbiased review. The FTB not

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[29] Hyatt Affid., ¶¶ 136, 162 [*Appdx., Exh. 7*].

[30] Cox Narrative Report, at H00039-00078, [*Appdx., Exh. 13*].

[31] *See, e.g., Albert H. Wohlers and Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev. 1998).

only breached its promises, but it sought an extorted settlement from Hyatt by overtly threatening further disclosure and publicity. The evidence and damages regarding the first false promise are essentially the same as that addressed in the above section on the closely-related, but separate, invasion of privacy claim. This section therefore addresses the second false promise.

As summarized below, Hyatt has established that the lead auditor created false evidence – which is a criminal offense under California law[32] – and used it to try to extort a settlement from Hyatt.

1. The one-sided fraudulent audit.

The FTB publicly claims to be fair and impartial in its dealings with taxpayers. It professes to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.[33] Hyatt's first auditor, Marc Shayer, even testified that he promised to conduct a fair and unbiased audit.[34]

Yet, the record shows that the FTB's methods at that time targeted high-income, former California residents, rewarded its own auditors based on the amount they could assess (measured by a cost-benefit ratio), penalized auditors who found "no change" in their audits, and used penalties as "bargaining chips" to induce settlements,

[32] *See, e.g.*, Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

[33] Illia depo., p. 303 [*Appdx., Exh. 14*]. *See also* the FTB Mission Statement [*Appdx., Exh. 28*].

[34] Shayer depo., pp. 474, 476, 482-83 [*Appdx., Exh. 15*].

making the Hyatt audit the biggest potential boost to any auditor's career.[35]

The FTB's third auditor, Sheila Cox, fully acknowledged in deposition testimony that she focused exclusively on information obtained which could be construed as supporting the FTB's position.[36] She completely ignored documentary evidence and witness statements directly contrary to the FTB's preordained conclusion.[37] She did not investigate the most relevant information. If she had, she would have had to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

The FTB did not conduct a legitimate, bona-fide audit. Instead, the FTB conducted a biased, fraudulent investigation in which Cox destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer records of bank account analysis).[38] Relevant to her intent, Cox told her husband and others during the Hyatt audits that she was "going to get the Jew bastard."[39] After the audit was concluded and she had assessed Hyatt millions of dollars in trumped-up taxes and penalties, she *telephoned* Hyatt's bitter ex-wife from whom he had been

[35] *See* supporting deposition excerpts and documents cited and included in Hyatt's *Crime/Fraud* brief to the discovery commissioner [*Appdx., Exh. 29*]; *see also* Les depo., pp. 226-228, 615, 674, 678, 684-687 [*Appdx., Exh. 17*].

[36] Cox depo., pp. 168-69, 1618-19 [*Appdx., Exh. 16*].

[37] Cowan Affid., Exhibit 14 thereto [*Appdx., Exh. 6*].

[38] Cox depo., pp. 17, 174-175, 190, 341, 342, 423-24, 569, 605, 661, 861, 971 [*Appdx., Exh. 16*].

[39] Les depo., p. 10 [*Appdx., Exh. 17*].

divorced for many years and bragged about the "conviction."[40] Cox was hardly a fair and unbiased auditor. The discovery commissioner even declared that the FTB may have committed fraud and accordingly ordered that Hyatt was entitled to further discovery on this point.[41]

The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt which it uncovered during its invasive "audit." For example, the FTB simply ignored:

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who knew of Hyatt's move to Nevada;
- the adult son who knew of Hyatt's move to Nevada;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt;
- Nevada religious, professional, and social affiliations of Hyatt; and

[40] Maystead depo., pp. 182-84 [*Appdx., Exh. 18*].

[41] November 9, 1999 hearing transcript (excerpt), pp. 55-56 [*Appdx., Exh. 26*].

- Hyatt's changes of address from California to Nevada address.[42]

The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as asserting fraud penalties against Hyatt.[43] The depositions conducted to date establish that the FTB ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's pre-determined conclusion.[44] It never even interviewed Hyatt. The FTB did not even speak with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during April 1992. Rather than interviewing two of Hyatt's long-time business associates, the FTB proceeded to audit them, seeking through intimidation to separate them from Hyatt.[45]

Instead, the FTB interviewed and obtained statements from estranged relatives and an ex-wife that were falsely termed "affidavits," and which formed the cornerstone of the FTB's "case" despite the complete lack of credibility and relevance of the statements.[46] More importantly, the

[42] Cowan Affid., Exhibit 14 thereto [*Appdx., Exh. 6*].

[43] Cox Narrative Report, at H00039-00078 [*Appdx., Exh. 13*].

[44] Cox depo., pp. 1181, 1187-1188 [*Appdx., Exh. 16*]; Cowan Affid., Exhibit 14 [*Appdx., Exh. 6*].

[45] Cox depo., pp. 29, 168-69, 181, 1460-61, 2021 [*Appdx., Exh. 16*]; Hyatt Affid., ¶ 164 [*Appdx., Exh. 7*].

[46] Maystead depo., pp. 182-84 [*Appdx., Exh. 18*]; Hyatt affid., ¶¶ 63, 164, 174, 175, 181 [*Appdx., Exh. 7*].

statements contained in the "non-affidavits" were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's conclusions. The only specific statements in the unsworn "affidavits" were expressly disclaimed by the declarant in concluding that she could not be held to what is stated therein in a court of law.[47] In other words, the "cornerstone" of the FTB's case was built on sand that crumbles upon even mild cross-examination.

2. The $9 million fraud penalty and the FTB's urging Hyatt to settle.

The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based on its trumped-up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada residency. The penalties amounted to an additional 75% of the alleged taxes. The FTB teaches its auditors to use the fraud penalty as a "bargaining chip" to obtain "agreement" from the taxpayer to pay the assessed tax.[48] To make its point, the FTB's penalties training manual has on its cover a menacing "skull and cross-bones,"[49] an attitude of intimidation directed at Hyatt through tortious conduct.

In classic extortion form, Jovanovich boldly "suggested" to Hyatt's representative that settling at the "protest stage" would avoid public revelation of Hyatt's personal and financial information. Deposition testimony

[47] H 00302-07 [*Appdx., Exh. 19*].

[48] Ford depo., pp. 128-29 [*Appdx., Exh. 20*].

[49] FTB H 08950 [*Appdx., Exh. 21*].

has confirmed that Jovanovich, the FTB's first protest officer, told Hyatt's tax representative that if he did not settle at the outset of the protest stage,[50] the privacy and confidentiality that Hyatt so valued would be lost.[51]

Specifically, she told Hyatt's tax representation that it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of many unresolved facts and questions" related to Hyatt.[52] Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy[53] and that he was "paranoid" about his privacy – an understanding shared among the FTB auditors and the FTB residency unit.[54]

3. Hyatt was damaged by the FTB's fraud.

Hyatt, having no reason to suspect that the FTB, as an organ of California government, would act in a false, predatory manner, reasonably relied on the truthfulness of the assurances and representations (both explicit and

[50] Cowan Affid., ¶ 32 [*Appdx., Exh. 6*].

[51] Jovanovich depo., pp. 50-52, 168, 185-186 [*Appdx., Exh. 23*].

[52] Jovanovich notes from June 12, 1997 [*Appdx., Exh. 24*].

[53] Jovanovich depo., p. 125, Ins. 20-24 [*Appdx., Exh. 23*].

[54] Jovanovich depo., p. 126, Ins. 4-8 [*Appdx., Exh. 23*].

implied) by the FTB and its agents.[55] Thus relying, Hyatt agreed to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents.[56] Hyatt in fact relied upon the false representations and assurances of the FTB and its agents to his extreme detriment, as explained above.

Two simple facts demonstrate the potential magnitude of the damages.

1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy, he closed license agreements for hundreds of millions of dollars.

2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close a single new license agreement.[57]

If Hyatt's right to a trial is not taken from him, he will prove that the timing of the FTB's tortious conduct and the total destruction of his licensing program is not coincidental, but rather the former caused the latter. In addition to his economic damages, Hyatt suffered emotional distress.[58]

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[55] Hyatt Affid., ¶¶ 10-12 [*Appdx., Exh. 7*].

[56] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

[57] Hyatt Affid., ¶ 136 [*Appdx., Exh. 7*].

[58] This Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct." *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

V. The Court overlooked or misapprehended the law when it granted the FTB's petition "on grounds other than those alleged in the petition."

First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court without even a hearing before this Court on an issue never raised in the FTB's writ petition. Second, the order is contrary to this Court's own line of cases reversing district court orders that mistakenly grant summary judgment when material issues of fact are in dispute and that require all reasonable inferences to be drawn in favor of the non-moving party, as well as its line of cases refusing to review denials of summary judgment.

These propositions are self evident and very familiar to this Court. Hyatt has no more space in this petition to further develop these points, except to emphasize that the Court is not only unfairly denying him his day in court but is doing so prematurely before he has completed discovery. A substantial part of discovery, including court-ordered discovery, was pending when the Court stayed the action. The remaining discovery was detailed in an affidavit submitted to the district court as an alternative ground for denying the FTB's summary judgment motion.[59] Given this Court's disagreement with the district court regarding the sufficiency of the evidence after its own review and reweighing, Hyatt renews his request to complete discovery before his case is dismissed on such grounds.

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[59] Bourke Affidavit, ¶¶ 182, 183, and 186 [*Appdx., Exh. 25*].

VI. Hyatt again requests leave to file an additional briefing specifically addressing the evidentiary support for his claims.

Hyatt requested leave of court to file a petition in excess of the Court's ten-page limit.[60] Hyatt again renews this request. Whether the Court is inclined to grant or deny the petition, Hyatt should be given a full and fair opportunity to demonstrate the adequacy of his evidence to date. It may be his only "day in court."

DATED this 2 day of July, 2001

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[60] Hyatt filed his request to exceed the ten page limitation for petitions for rehearing and to extend the time for filing such petitions on June 18, 2001. As of the filing of this petition, the Court had not ruled on this request.

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IN THE SUPREME COURT OF THE

STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No. 36390 **REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL***

Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first demonstrates that there are material facts in dispute in regard to the four issues upon which the Court based its order granting the FTB's petition and then discusses additional facts, evidence and law that the Court overlooked or misapprehended in its order granting the FTB's petition.

TABLE OF CONTENTS

Page

I. Genuine issues as to material fact exist as to the four conclusion [sic] reached by the Court in footnote 12 of the June 13 Order 1

A. Evidence of record shows that the FTB "produced false statements" 1

B. Evidence of record shows that the FTB publicized its investigation or findings outside the scope of the investigation 2

C. Evidence of record shows that the FTB did not comply wit its internal operating procedures with regard to contacting individuals 3

D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house and conduct its investigation through phone calls and letters" 3

II. Substantial, probative evidence supports Hyatt's invasion of privacy claims 5

A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts 5

B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion 5

1. Elements of claim 5

2. Supporting evidence 5

C. Substantial evidence of the FTB's casting Hyatt in a false light 7

1. Elements of claim 7

2. Supporting evidence 7

III. Substantial evidence supporting Hyatt's abuse of process claim 8

A. Elements of claim 8

B. Supporting evidence 8

IV. The Court has overlooked or misapprehended the law in considering an issue never raised in the FTB's petition for extraordinary relief 10

V. The Court has overlooked or misapprehended its own standards regarding review of denials of summary judgment motions 11

VI. The Court has overlooked the law regarding the FTB's immunity in California for the conduct at issue has been overlooked or misapprehended 12

VII. Conclusion 14

I. Genuine issues as to material fact exist as to the four conclusions reached by the Court in footnote 12 of the June 13 Order.[1]

The Court's June 13 Order concluded that the FTB had met its burden that at least one element of each of Hyatt's claims had not been shown. The Order said the FTB did that " . . . by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters."[2] Based on this, the Court then found no genuine dispute "that Franchise Tax Board's acts during its investigation constituted intentional torts[,]" citing Nevada law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this Supplement refutes

[1] The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: *[Appdx., Exh. "x"]*. For clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix. Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

[2] See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to the FTB's motion for summary judgment *[Appdx., Exh. 27]* that discusses the Constitutional and statutory basis and origin of the invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted by Hyatt.

this. A brief summary of the evidence, and reasonable inferences which can be derived therefrom, contradicts each of these allegedly undisputed issues."[3]

A. Evidence of record shows that the FTB "produced false statements". Genuine issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements include:

> (1) FTB written confidentiality promises contained in its communications to Hyatt;[4]
>
> (2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific pledges of confidentiality in return for Hyatt providing additional information;[5]
>
> (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[6]
>
> (4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;[7]

[3] These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt has not been able to complete his investigation of these and other relevant facts.

[4] Petition, as 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

[5] Petition, at 3.

[6] Petition, at 6-8.

[7] Les Depo., pp. 10, 25, 172, 176 *[Appedx., Exh. 17]*.

(5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly contradicted by deposition testimony of the apartment manager;[8]

(6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that they were required by California law to comply with these demands;[9]

(7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by Auditor Cox as containing damaging information about Hyatt;[10]

(8) The FTB falsely stated that the audit file had been through extensive levels of review by FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the audit file and all of the information regarding Mr. Hyatt's residency status." However, in deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their review of

[8] Kopp Depo., pp. 75-76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*.

[9] *Infra*, at 8-9.

[10] Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) *[Appdx., Exh. 25]*. The FTB knew that what it labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview summaries." However, Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they served as the foundation for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing evidence to support): "[A]s evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from several individuals that the taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. *[Supp. Appdx., Exh. 45]*.

her assessment.[11] This cursory review also led to the assessment of an additional $6.4 million in taxes and penalties for a total assessment of $9.9 million.[12]

Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

B. Evidence of record shows that the FTB publicized its investigation or findings outside the scope of the investigation. Genuine issues of material fact exist as to issue (2) in footnote 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its investigation include:

(1) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to Candace Les who had no "need to know."[13]

(2) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to non-FTB personnel;[14]

(3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife when Cox boasted, "We got him."[15]

[11] Lou Depo., p. 81 *[Supp. Appdx., Exh. 44]*.

[12] Ford Depo., p. 90-92 *[Supp. Appdx., Exh. 43]*.

[13] *Infra*, at 7-8.

[14] *Infra*, at 7-8.

[15] Maystead Depo., pp. 182-84. *[Appdx., Exh. 18]*.

(4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that Hyatt had provided the FTB with copies of their confidential agreements;[16] and

(5) Disclosure of Hyatt's private information to three newspapers.[17]

Again, this Court cannot say that the FTB never publicized its investigation or findings outside the scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing, inappropriately, a fact-finder's function.

C. Evidence of record shows that the FTB did not comply with its internal operating procedures with regard to contacting individuals. Genuine issues of material fact exist as to issue (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with regard to contacting individuals include violating its policies, rules and procedures:

(1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt, or his close associates and close family members, thereby failing to conduct a fair, unbiased audit;[18]

(2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing

[16] Petition, at 9.

[17] Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 *[Appdx., Exh. 10]*.

[18] Petition, at 6-8.

social security numbers and other confidential Hyatt information to individuals or businesses;[19]

(3) Failure to contact Hyatt before contacting third parties;[20]

(4) Sending "Demands for Information" to individuals outside the State of California, absent special circumstances;[21]

(5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private information, inferring that "this could happen to you, too, if you don't agree to settle".[22]

Therefore, this Court cannot say that the FTB complied with its internal operating procedures with regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house and conduct its investigation through phone calls and letters." Genuine issues of material fact exist as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

[19] Petition, at 5.

[20] Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 *[Appdx., Exh. 4]*.

[21] *Infra*, at 9-10.

[22] Jovanovich Depo., 50-52, 268, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.

(1) Visits to Las Vegas apartment complexes and making records of questionable accuracy regarding interviews with apartment managers;[23]

(2) Sending an unprecedented number of "Demands for Information" to individuals outside the State of California;[24]

(3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[25]

(3) [sic] Searching through Hyatt's Las Vegas trash and mail;[26]

(4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;[27]

(5) Initiating tax audits of close Hyatt associates;[28]

(6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his tax attorney that without a settlement, Hyatt's finances would become public;[29]

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[23] Kopp Depo., pp. 75-76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*.

[24] *Infra*, at 9-10.

[25] Petition, at 6-8.

[26] Cox Depo., pp. *1077 [Appdx. Eh. 16]*; Les Depo., pp. 268-69, 405 *[Appdx., Exh. 17]*.

[27] Les Depo., pp. 264, 402-03 *[Appdx., Exh. 17]*.

[28] Hyatt Affid., ¶ 164 *[Appdx., Exh. 7]*.

[29] Jovanovich Depo., pp. 50-52, 168, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.

(7) Vowing to "get that Jew bastard."[30]

Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its investigation through phone calls and letters. If the Court believes that these actions are *de minimus*, it is performing, inappropriately, a fact-finder's function.

In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the FTB since such treatment of a California resident would be unlawful and subject to redress under California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former California residents who have moved to Nevada. Private addresses for celebrities living in Nevada, along with their social security numbers and allegations of possible criminal accountability to California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims brought by a Nevada citizen against the FTB will, if not summarily

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[30] Les depo., p. 10 *[Appdx. Exh. 17]*.

dismissed at the district court level, enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious than those against Hyatt, be ordered dismissed in the district courts.

II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.

A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.

As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for disclosure of private facts encompasses both the newer, well-recognized claim for invasion of informational privacy as well as the more traditional claim of public disclosure of private facts. The district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-pleading standard.[31] Hyatt summarized the supporting evidence in the Petition and through various exhibits attached to the appendix submitted with the Petition.[32] Hyatt's additional invasion of privacy claims are interrelated with this claim, and each is supported by the evidence summarized in the Petition, and further by the additional evidence summarized below.

[31] Nev. R. Civ. P. Rule 8(a).

[32] Petition, at 1-5.

B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.

1. **Elements of claim:** (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; and (3) that would be highly offense to a reasonable person."

2. **Supporting evidence:**

In addition to the evidence summarized in the Petition, affidavits and depositions have established the following facts, which give rise to the inference that the FTB unreasonably intruded upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with whom Hyatt either in the past or in the future has had or might reasonably expect to have social or business interactions, and she either disclosed or implied to them that Hyatt was under investigation in California.[33] On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas home[34] – after the audit was over[35] – and took a trophy photograph of Les standing on Hyatt's property in front of Hyatt's residence.[36] This corroborates Les' testimony that Cox was obsessive in her zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found tortious. Because the

[33] Cox Depo., pp. 426-27, 957, 1329-30, 1873 *[Appdx., Exh. 16]*; Hyatt Affid., ¶ 129 *[Appdx., Exh. 7]*.

[34] Les Depo., p. 42 *[Appdx., Exh. 17]*.

[35] Les Depo. pp. 54-55 *[Appdx., Exh. 17]*.

[36] Les Depo., pp. 264, 402-03 *[Appdx., Exh. 17]*.

audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized stalking.[37] Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers' Bill of Rights.[38] Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former apartment and his Las Vegas home violated California's privacy act and published FTB procedures.[39] Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which trips included unannounced visits with residents of Hyatt's former neighborhood and questions about private details of Hyatt's life.[40] All of these facts and circumstances, taken together, support Hyatt's claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes, to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors, the Licensing

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[37] Les Depo. pp. 54-55 *[Appdx., Exh. 17]*.

[38] California Revenue & Taxation Code § 21014 *forbidding* any FTB employee from conducting an investigation or surveillance of any person except for tax purposes. For purposes of the prohibition, the Legislature defined investigation as "any oral or written inquiry" and surveillance as "the monitoring of persons, places, or events by means of ... overt or covert observations, or photography, or the use of informants."

[39] California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 *[Appedx., Exh. 3]* ("employees *shall not access or use* personal or confidential information about individuals maintained by the department without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis added.)

[40] Cox Depo., pp. 1158, 1161, 1165, 1176 *[Appdx., Exh. 16]*; Les Depo., pp. 24-25, 385-86 *[Appdx., Exh. 17]*.

Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was under a cloud of suspicion.[41] The FTB, through its investigative actions, and in particular the manner in which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt, would find them to be highly offensive.[42] Even if these intrusions were part of a "standard" FTB investigation, this is not a defense to this tort, which only requires that the intrusions be intentional, affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions were intentional; they affected Hyatt's seclusion; and would be highly offense to a reasonable person under the circumstances.

C. Substantial evidence of the FTB's casting Hyatt in a false light.

1. **Elements of claim:** (1) giving publicity to a matter concerning another; (2) that places the person in a false light; (3) that would be highly offensive to a reasonable person; and (4) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[43]

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[41] Cox Narrative Report *[Appdx., Exh. 13]*.

[42] *See, e.g.*, Hyatt Affid., ¶ 129-138 *[Appdx., Exh. 7]*.

[43] *See Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of the publication

(Continued on following page)

2. Supporting evidence:

The evidence summarized above and in the Petition is fully applicable to this claim as well. Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of Hyatt's son – and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers, and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked about Hyatt incessantly.[44] Cox talked about the case "constantly," "year after year." She talked about the Hyatt case so much and was so unwilling to let it go – even after it was closed – that Les concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her own head about it.[45]

She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former California house –

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need not necessarily be false. *See, e.g., Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even though photograph was not "false.")

[44] *See* Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103-104-105, 113-114, 125-126, 140-141, 141-142, 143-144, 167-168, 171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively *[Appdx. Exh. 17]*.

[45] *See* Les Depo., pp. 59-60, 61-63, 167-168 *[Appdx., Exh. 17]*.

referring to his old house as a "dump," falsely stating it contained a "dungeon," and calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other "ghouls."[46] She disclosed facts to her friend about his family members, his colon cancer, his patent business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and that the Hyatt audit was one of the largest, if not the largest, in history.[47] Cox obtained written statements only from Hyatt's estranged relatives and not from his friends, associates and other family members.[48]

During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under investigation in California,[49] and engaged in other conduct that would reasonably cause these persons to have doubts as to Hyatt's moral character and his integrity.[50] In short, the FTB's actions in conducting interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet

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[46] Les Depo., pp. 10, 25, 172, 176 *[Appdx., Exh. 17]*.

[47] Ford Depo., pp. 148-55 *[Supp. Appdx., Exh., 43]*.

[48] *Hyatt Affid.*, ¶¶ 117, 118, 174, 175 *[Appdx., Exh. 6]*.

[49] Appdx., Exhs. 9-10.

[50] *E.g.*, Chang Depo, pp. 32-33 *[Supp. Appdx., Exh. 32]*.

distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.[51]

In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

III. Substantial evidence supporting Hyatt's abuse of process claim.

A. Elements of claim: Government agencies commit abuse of process when their demands for information are motivated by an improper purpose, such as to harass the taxpayer or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.[52] An agency that acquires information in an investigation by fraud, deceit, or trickery commits an abuse of process.[53]

B. Supporting evidence:

The FTB sent numerous Nevada business and professional entities and individual residents "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under California law* to issue subpoenas

[51] *See, e.g.*, Hyatt Affid. ¶¶ 129, 143-44 *[Appdx., Exh. 6]*.

[52] *United States v. Tweel*, 550 F.2d 197, 299 (5th Cir. 1977).

[53] *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

and demanded that the recipients thereof produce the information concerning Hyatt.[54] Moreover, these Demands were captioned on behalf of the "People of the State of California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been instituted. The FTB has never claimed that it sought or received permission from any Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents and business entities responded with answers and information concerning Hyatt. These "quasi-subpoena" Demands on their face support the inference that they were calculated to coerce Nevada residents into responding through deception, fear and intimidation. In contrast, more polite correspondence requesting, rather than demanding, information, was sent to Nevada officials such as Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The inference can be drawn that these individuals would have recognized the absence of any authority for a California tax agency to "Demand" information from a Nevada resident and would have taken offense at such a "Demand."[55]

The Demands wrongfully disclosed Hyatt's social security number and in some instances his private address. Contrary to the requirements of the California

[54] FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 *[Appdx., Exhs. 9-10]*.

[55] FTB H 01715, 01716 *[Supp. Appdx., Exh. 35]*.

privacy act, the FTB did not first go to Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands did not disclose to the Nevada recipients that they were voluntary, since California has no power to subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers, accountants, and financial institutions without Hyatt's knowledge or consent and without first sending Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing agreements, showing that he may have violated the confidentiality clause of the agreements. A reasonable inference is that these actions were intended to damage Hyatt's business relationships.

Moreover, after consulting with Anna Jovanovich,[56] Cox began sending out the Demands For Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent out in their entire careers.[57] She did so without first ascertaining that the third

[56] 1991-tax-year audit workpapers, FTB 100139 [*Supp. Appdx., Exh. 34*].

[57] Ford Depo., pp. 91-92 [*Supp. Appdx., Exh. 43*]; Shigemitsu Depo., p. 187 [*Supp. Appdx., Exh. 41*]; Alvarado Depo., p. 44, [*Supp. Appdx. Exh. 35*], S. Semana Depo., pp. 82-83 [*Supp. Appdx., Exh. 36*], B. Gilbert Depo., pp. 35-36 [*Supp. Appdx. Exh. 37*], Illia Depo., pp. 178-179 [*Supp. Appdx. Exh. 42*].

party was uncooperative, as required by the FTB's Residency Manual.[58] She did so without first seeking the information from the taxpayer, as required by law.[59] This invasion of Hyatt's privacy has been condemned by the auditors who have been asked about it.[60] A reasonable inference can be drawn that these actions were undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense, rather than for legitimate, residency audit purposes.

IV. The Court has overlooked or misapprehended the law in considering an issue never raised in the FTB's petition for extraordinary relief.

Since *State v. Thompson*[61] was decided in 1983, Hyatt has not found any instance like this one, where the Court granted a petition for extraordinary relief, on the ground that the district court erred in denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here, the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to

[58] FTB 00844 [*Supp. Appdx., Exh. 38*] (To obtain information from *uncooperative* third parties, the auditor should use the Demand for Information Form (FTB Form 4973).) (Emphasis added.)

[59] Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

[60] Illia Depo., p. 248 [*Appdx., Exh. 42*]; Bauche Depo. p. 439 [*Supp. Appdx., Exh. 40*].

[61] 99 Nev. 358, 662 P.2d 1338 (1983).

interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers."[62] Despite the Court's stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never raised in its petition.[63] Hyatt is similarly unaware of any opinion in which this Court granted extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to established precedent holding that "the burden on the party seeking extraordinary relief is a heavy one."[64] By granting the FTB's petition on grounds never raised in the petition, the Court has disregarded its own precedent and completely relieved the FTB from its heavy burden.

If, in fact, the Court intended to establish new policy related to writ practice and return to pre-1983 authority under which the Court reviewed denials of summary judgment motions based on sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB, then remand this matter to the district court for further proceedings. Then, an appeal can be

[62] Order, June 13, 2001, at 3.

[63] *Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

[64] *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

taken with an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-fact through its independent review of a record, which, although large, was not complete (the parties had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding appeals from summary judgment has always been to scour the record to see *if there are material issues of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always favored*. And it is well-established that an appellate tribunal may not weigh the facts, as the court has done here.

V. The Court has overlooked or misapprehended its own standards regarding review of denials of summary judgment motions.

The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the evidence presented on the FTB's summary judgment motion *and reasonable inferences from that evidence, which must be drawn favorably to Hyatt*,[65] meet all the elements of one or more of the claims in Hyatt's First Amended Complaint.[66]

[65] *NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought; the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has a right to trial when there remains the slightest doubt as to remaining issues of fact.").

[66] As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she granted

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Hyatt's facts and the reasonable inferences drawn therefrom entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to illicitly exact funds from him through fraud and the commission of the other torts that were all utilized to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the types of acts complained of by Hyatt.[67] All Hyatt wanted was a fair audit, and the FTB promised that to him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises were never intended to be kept and that Hyatt

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that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991 and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB Motion for Judgment on the Pleadings).

[67] Vol. 145 No. 114 – Part III Congressional Record (P. E1773-75) *[Supp. Appdx. Exh. 46]*.

was singled out for extraordinarily unfair and damaging treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of advancement) by assessing large taxes, interest, and fraud penalties.

The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its version of the facts and the inferences which those facts support, an essential part of our adversary system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder can draw from the evidence, then this Court's June 13 Order adopts a new standard under which inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil case will require "smoking gun" direct evidence of each element of each claim, and circumstantial evidence and reasonable inferences will not be available to establish such elements for the fact-finder. Clearly, such a drastic change in civil practice should come only after an appropriate district court proceeding and appellate record made with an understanding that those are the rules which now govern civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for implementing, in an unpublished order, such major changes in civil practice.

Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-finder to resolve those issues: does the

fact-finder accept Hyatt's evidence that the FTB has motivated to and did conduct a biased, unlawful and tortious investigation resulting in great personal and professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept the FTB's contention that its auditors merely followed their procedures in conducting a standard investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided to accept the FTB's version of the facts over Hyatt's.[68] Again, such a change in this Court's appellate role should be pronounced in a published opinion, followed by a remand to let the district court review the evidence under this new standard governing the relationship between the district courts and the Supreme Court.

VI. The Court has overlooked or misapprehended the law regarding the FTB's immunity in California for the conduct at issue.

In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California Government Code and *Mitchell v. Franchise Tax Board*[69] for the proposition that California accords its government agency immunity for

[68] The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

[69] 183 Cal. App. 3d 1133, 228 Cal.Rptr. 750 (1986).

intentional torts. But the statute's plain language provides immunity in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on that individual's property. While the very fact that the FTB initiated an audit against an individual cannot be the basis of a tort claim, this is ***not*** the basis of Hyatt's suit.[70] Here, as repeatedly stated throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in California.[71] Moreover, California's Constitution and California's privacy laws forbid the FTB from engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.[72] California cannot therefore object if held liable

[70] *Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]s' allegations, go beyond the contention that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 Cal.App. 4th 919, 929, 74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating or prosecuting any judicial or administrative proceeding."

[71] The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp. 55-56 *[Appdx. Exh. 27]* and Cowan affid., ¶¶ 43, 44 *[Appdx. Exh. 6]*.

[72] California Constitution, Art. I, sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the Constitutional amendment was to

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in Nevada for conduct not protected by its own immunity statute and for which its own laws provide relief to an aggrieved party.

Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad, Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,[73] but the analysis does not stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California must comply with its internal, statutory and Constitutional privacy obligations – obligations entirely consistent with Nevada law on invasion of privacy.[74] Otherwise, Nevada residents targeted for audit by the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the Court nor the citizens of Nevada would find palatable.

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provide protection against the encroachment on personal freedom caused by increased surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information Practices Act (Cal. Civ. Code § 1798 *et seq.)* (also providing that improper dissemination of information gathered by state agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

[73] Order, June 13, 2001, n. 13.

[74] *See* Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 *[Appdx. Exh. 27]*.

VII. Conclusion.

For the aforementioned reasons, rehearing and remand should be granted in order to afford Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.[75] *Before* the court *rules* in a writ petition on an issue which it declares as determinative of Hyatt's entire case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ . . . ") he should be given the right to be heard on the issue. Where this court thinks a writ may appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court (Hyatt) has been precluded from refuting that ground.

The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of speculation and surmise."[76] *None* of the tortious acts committed against Hyatt, now a 10-year

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[75] At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as *Supp. Appdx. Exh. 47*, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

[76] *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P. 2d 588 (1992).

Nevada resident, are triable in a Nevada court under this Court's June 13 Order, even torts committed *entirely in Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-finder.

Finally, this is an extremely high profile matter,[77] and a decision like the June 13 Order which appears to depart from established procedures and precedents of this Court on writ practice and summary judgment standards should be fully argued and briefed before being resolved, before trial, by this Court. As this Court recognizes, "the law favors trial on the merits."[78] If Hyatt is to be denied a trial on the merits, than at a *minimum* he should be allowed to fully argue and brief the issue under any new summary judgment standards which this Court seems to enunciate and find determinative in its June 13 Order.

Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of any summary

[77] For example, immediately after this Court's order, the FTB was publicly touting it before its Franchise Tax Board Advisory Board. "FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in a high-profile *Hyatt* residency case. The Taxpayer had asked the court to halt the FTB audit as 'too intrusive.' In a non-written opinion on June 13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB's request for summary judgment. Mr. Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome." (California Taxpayer's Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, *[Supp. Appdx., Exh. 48]*.

[78] *Home Sav. Ass'n Nev. Sav. & Loan Ass'n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).

judgment entered pursuant to the June 13 Order, and remand this matter for trial on the merits. The Court should also review the extensive record of the Discovery Commissioner and the district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under the Court's June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the district court to evaluate Hyatt's evidence in light of the standards for writ practice and summary judgment review which the Court establishes in its order following rehearing.

DATED this 23 day of July, 2001

HUTCHISON & STEFFEN

BERNARD & LESLIE, CHTD.

By: /s/ Peter C. Bernhard
Peter C. Bernhard, Esq.